United States Court of Appeals

for the Second Circuit

APPENDIX

77-1033

ORIGINAL

B
BJS

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

JAMES LEONARD BROWN,

Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

APPENDIX

MICHAEL B. POLLACK
Attorney for Defendant-Appellant
1345 Avenue of the Americas
New York, New York 10019
(212) 247-3720

UNITED STATES COURT OF APPEALS
FILED
MAR 7 1977
DANIEL FUSARO, CLERK
SECOND CIRCUIT

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TABLE OF CONTENTS

	Page
Docket Sheet (76 Cr. 603)	1a
Docket Entries	2a
Indictment 76 Cr. 603 (filed June 29, 1976)	5a

WITNESSES

Harvey Axelrod:	
Direct	15a
Cross	39a
Winfield Schweickart:	
Direct	45a
Cross	51a
Redirect	57a
Recross	60a
James M. Avena:	
Direct	62a
Cross	72a
Redirect	79a, 86a
Recross	82a
Ralph Montuori	
Direct	88a
Cross	93a
Redirect	103a
Chester Gray (sic)	
Direct	107a
Cross	111a
John Krappman:	
Direct	112a

Contents

	Page
Excerpts of Transcript of Proceedings	15a
Charge of the Court	120a
Defendant Brown's request No. 1 "Guilty pleas of other defendants"	182a
Agreement between John Krappman and United States of America	183a
Agreement between Harvey Axelrod and United States of America	185a
Amended complaint in Manufacturers Hanover Trust Company, et al. v. Arnold, et als.	188a

DOCKET SHEET (76 Cr. 603)

1a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v-

Quido Benigno, et als.
Defendants

Docket Number 76 Cr. 603

Haight
(District Court Judge)

NOTICE OF APPEAL

Notice is hereby given that JAMES LEONARD BROWN appeals to the United States Court of Appeals for the Second Circuit from the [X] Judgment [ ] order [ ] other (specify) of conviction entered in this action on December 23, 1976
(Date)

(Counsel for Appellant)

Date Dec. 23, 1976

Address MICHAEL B. POLLACK
1345 Avenue of the Americas
New York, New York 10019

To:
Robert Fiske, Esq.
United States Attorney
One St. Andrews Place
N.Y., N.Y.

Phone Number (212) 247-3720

ADD ADDITIONAL PAGE IF NECESSARY

(TO BE COMPLETED BY ATTORNEY)

TRANSCRIPT INFORMATION – FORM B

▶ QUESTIONNAIRE

[ ] I am ordering a transcript
[ ] I am not ordering a transcript
Reason:
[ ] Daily copy is available
[ ] U.S. Attorney has placed order
[ ] Other. Attach explanation

▶ TRANSCRIPT ORDER

▶ DESCRIPTION OF PROCEEDINGS FOR WHICH TRANSCRIPT IS REQUIRED (INCLUDE DATE).

Prepare transcript of
[ ] Pre-trial proceedings
[ ] Trial
[ ] Sentence
[ ] Post-trial proceedings

The ATTORNEY certifies that he will make satisfactory arrangements with the court reporter for payment of the cost of the transcript. (FRAP 10(b)) ▶ Method of payment [ ] Funds [ ] CJA Form 21

ATTORNEY'S signature | DATE

▶ COURT REPORTER ACKNOWLEDGEMENT

To be completed by Court Reporter and forwarded to Court of Appeals.

Date order received	Estimated completion date	Estimated number of pages.

Date _____ Signature _____
(Court Reporter)

BEST COPY AVAILABLE

COPY FOR DEFENDANT

DOCKET ENTRIES

(pp. 2a-4a)

OFFENSE PO ☐ / H OFFENSE MO ☐ / DEMEANOR Mis ☐ / FELONY Fel ☒

Docket No. XXXXXX

Disp./Sentence: 0865

Origin of Offense: 0208 1

vs

BROWN, JAMES LEONARD

(LAST, FIRST, MIDDLE)

JUVENILE ☐

Date Filed Mo. 06 Day 29

No. of Def's 07

Yr. 76 | Docket No. 0603 | Def. 02

U.S. MAG. CASE NO. ▶

U.S. TITLE/SECTION	OFFENSES CHARGED	ORIGINAL COUNTS
18:371	Consp. to commit offenses against the U.S,	1
15:77q(a)	Securities fraud.	2-9

SUPERSEDING COUNTS

BAIL • RELEASE

☐ Denied ☐ AMT Set ☐ Fugitive ☐ Pers. Recog. ☐ PSA

$ 000

Date

conditions: ☐ 10% Deposit ☐ Surety Bond ☐ Collateral ☐ 3rd Pty Cust ☐ Other

☐ Bail Not Made ☐ Status Changed (See Docket)

II. KEY DATES & INTERVALS

ARREST or U.S. Custody Began: 6-29-76
Summons Served
First Appearance

High Risk Date

Indict. Waived ☐
In Charging District

INDICTMENT ☒ Information ☐: 6-29-76
Superseding ☐ Indict/Info ☐

ARRAIGNMENT
1st Plea: 7-8-76
Final Plea

Trial Set For
☐ NG ☐ G ☐ NOL
G. Plea W/Drawn
☐ NG ☐ G ☐ NOL

TRIAL
Voir Dire ☐
Trial Began ☒ ☐ J / N
10-14-76
Trial Ended
10-26-76

SENTENCE
Disposition of Charges: 10-26-76
☒ Convicted ☐ Acquitted ☐ Dismissed ☐ On Govrnm'ts Motion
12-23-76
☒ On All Charges ☐ On Lesser * Offense(s) ☐ WOP ☐ WP

MAGISTRATE

	DATE	INITIAL/NO.
Search Warrant: Issued		
Search Warrant: Return		
Summons: Issued		
Summons: Served		
Arrest Warrant Issued		
COMPLAINT ▶		
OFFENSE (In Complaint)		

INITIAL APPEARANCE DATE ▶ — INITIAL/NO.

PRELIMINARY EXAMINATION OR ☐ REMOVAL HEARING: Date Scheduled ▶ / Date Held ▶

☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT

Tape Number

OUTCOME:
☐ DISMISSED
☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT
☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW

U.S. Attorney or Asst.

John S. Lutz
791-1129

ATTORNEYS Defense ☐ CJA, ☒ Ret. ☐ Waived, ☐ Self, ☐ None / Other ☐ PD, ☐ CD

Drigo Stineone, 35-10 Bway, NYC
721 5340.

* Show last names and suffix numbers of other defendants on same indictment/information

DATE	(DOCUMENT NO.) PROCEEDINGS	EXCLUDABLE DELAY (a) (b) (c) (d)
6-29-76	Filed indictment.	
6-30-76	Filed Writ of H/C ad Pros. issued and returnable 7/8/76	
7-8-76	Deft. did not appear. Atty. Edward C. Montell appeared. Court directs entry of not guilty plea. 10 days for motions. Bail fixed at $20,000. unsecured P.R.B. for Deft. paroled in custody of attorney. Case assigned to Haight, J. WARD, J.	
7-19-76	Filed Govt. Notice of Readiness for Trial on or after 9/12/76.	
7-19-76	Filed Notice of Appearance by Drigo Stineone-35-10 Bway, NYC - Tel. 721-5340 -728-2429.	
7-19-76	Filed Gov'ts Notice of Readiness x for Trial on or after 9/12/76.	
8-26-76	Filed Memorandum in support of dft. James Leonard Brown's motion to dismiss the indictment.	

DATE	IV. PROCEEDINGS (continued) (DOCUMENT NO.) PAGE TWO	V. EXCLUDABLE DELAY Interval Section (a)	Start Date End Date (b)	Ltr Code (c)	Total Days (d)	Proc. Mde Unit
07-27-76	Deft. JAMES LEONARD BROWN present with Atty. Michael Pollack. Deft. pleads not guilty In this matter he is considered to released in his O.R. Bail fixed at $20,000.00 unsecured P. R.B. Deft. is to be confined to the metropolitian Correctional Center pending trial...HAIGHT.J.					A
7-29-76	Issued Remand.					B
8-4-76	Fld appearance bond in the amount of $20,000 N/surety dated 8-4-76					C
						D
8-16-76	PTC between the Court & all counsel for dfts. with the exception of Atty. Klempner,New Counsel for Dft. Daly,Mr. Klempner was in touch with the court via phone & made his views known to the coutt. None of the dfts. views known to the court. None of the dfts. were present at this PTC. Court & counsel only. .....Haight J.					E F
8-19-76	Filed Dfts. Notice of Motions on behalf of dfts. Motion for Serverance,Bill of Particulars,Discovery & Inspection,Etc. Ret. Sine Die.					G
8-19-76	Filed Dfts. Notice ofMotion to Dismiss the Indictment. Ret. Sine Die.					H
9-1-76	Filed Gov'ts affdvt. in opposition to dfts. motions to dismiss indictment;to sever dft.&/or the false filing counts & to disclose the grand jury voting & attendance records.					L
9-1-76	Filed Gov'ts Memorandum of law in opposition to dfts. motions.					M
9-2-76	Mr. Elliott Pollack appearing for his brother Michael Pollack atty. of record. Mr. Pollack represents Dft. James Leonard Brown, who was not present. Govt. by John S.Lutz,AUSA, Atty. Pollack moves on 3 motions 1-to dismiss,2-Sever 3-disclosure. Decision reserved on all 3 motions in Dft. Brown's behalf.... .....Haight J.					N O P R
10-6-76	Filed Opinion #45213. 3 Motions of Dft. ,Motion to dismiss & serverance & disclosure of Grand Jury proceedings denied as indicated.....Haight J. (mm)					
10-14-76	Dft. James Leonard Brown present w/a Michael B. Pollack,Gov't by John S. Lutz,Spec. U.S.A. A Jury of 12 plus two (2) alternates are selected & sworn, Case proceeds to trial.					T
10-15-76	Trial Cont'd					U
10-18-76	Trial Cont'd					
10-19-76	Trial Cont'd					W
10-20-76	Trial Cont'd					
10-21-76	Trial Cont'd					

(Cont'd) FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	C.D NUMBER	DATE	RECEIPT NUMBER	C.D NUMBER

D. C. 110 Rev. [redacted] Page #3

DATE	PROCEEDINGS	Dat Judg
10-22-76	Trial Continues	
10-26-76	Trial Continues & concluded. At 6:55 pm. Jurors return with a verdict, as follows, Dft. Brown, Count one Guilty,Two Guilty,Three Guilty,Four Guilty,Five Guilty, Six Guilty,Seven Guilty,Eight Guilty,Nine Guilty.Dft. Brown, Sentence date is Dec. 10th 1976 PSR Ordered. Dft. Brown remanded to the custody of the U.S. Marshals. All jurors polled & discharged.....Haight J.	
11-4-76	Filed transcript of record of proceedings, dated 9-29-76	
12-23-76	Filed Judgment & Commitment (Atty. Michael B.Pallack Present) The Dft. is hereby committed to the custody of the Atty. Gen. or his authorized representative for imprisonment for a period of FIVE (5) YEARS on Count One,On condition the dft. be confined in a jail type in treatment institution for a period of SIX(6) MONTHS to commence upon the completion of dfts. term of imprisonment under the federal sentence he is presently serving, the execution of the remainder of the sentence of imprisonment is suspended & dft. placed on probation for a period of FOUR AND ONE HALF YEARS (4½) to commence upon his release from confinement,upon the following terms & conditions: 1. That he obey all local State & Federal laws. 2. That he comply with all rules & regulation of the probation dept. 3. That he report to the principal chaplian of the MCC,The Rev.Thomas S.J.Tolentino, or his successor, for assigment of such duties,at such times & places,the chaplin may direct,during the period of probation & subject to the standing probation orderes. of this court. On Counts #2,3,4,5,6,7,8 & 9, The Imposition of sentence is suspended,& dft. is placed on probation at each of those counts, for a period of time subject to the same terms & conditions as stated above. The terms & conditions of the Bail Agreement as applied to this dft. is to continue & the dft. is remanded...Pur. to Title 18 Sec.3651. The Court orders commitment to the custody of the Atty. Gen. & recommends that dft. continue to be incaracerated in the MEtropolitan Correctional Center,in order that he may continue training & vocational programs currently in progress....Haight J. Issued Commitment 12-27-76.	
12-29-76	Filed transcript of record of proceedings, dated 11-14,15,18,19-1976	
12-29-76	Filed transcript of record of proceedings, dated 11-20,21,22,26-1976	
1-3-77	Filed Notice of Appeal from Judgment dtd. 12-23-76.(mailed notice)	
1-5-77	Filed True Copy of J&C with marshals ret. Executed by forwarding copy of J&C to Warden,MCC 150 Park Row,NYC on 12/28/76.	
1-5-77	Filed W/H/C Ad Prose. Writ Allowed.....Knapp J. Writ Satisfied on 12-23-76.	
1-6-77	Filed Remand.	
1-14-76	Filed transcript of record of proceedings, dated 12-23-76	
1-24-77	Filed Notice of Certification of Record to the USCA.	
1-31-77	Filed transcript of record of proceedings, dated 12-23-76	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

INDICTMENT 76 CR. 603
(Filed June 29, 1976)
(pp.5a-14a)

UNITED STATES OF AMERICA :

-v- : INDICTMENT

QUIDO BENIGNO, : 76 Cr. 603
JAMES LEONARD BROWN,
ARTHUR CAPONEGRO, :
HARVEY AXELROD,
JOHN KRAPPMAN, :
ROBERT SMITH, and
ARTHUR DALY :

Defendants. :

COUNT ONE

THE CONSPIRACY

The Grand Jury charges:

1. From on or about March 1, 1972 up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, QUIDO BENIGNO, JAMES LEONARD BROWN, ARTHUR CAPONEGRO, HARVEY AXELROD, JOHN KRAPPMAN, ROBERT SMITH, and ARTHUR DALY, the defendants, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with James Phillips, Chester Grey and Frederick Horwitz, named herein as co-conspirators, but not as defendants, and with other persons to the Grand Jury known and unknown, to commit offenses against the United States, to wit, securities fraud in violation of Title 15, United States Code, Sections 77q(a), and 77(x).

THE OBJECT OF THE CONSPIRACY

2. It was a part of the conspiracy that the defendants and their co-conspirators unlawfully, wilfully and knowingly would, in the offer and sale of securities, to wit, American Home Products Corporation (A.H.P.C.) stock certificates (hereinafter "newly issued") which were obtained as replacements for counterfeited A.H.P.C. stock certificates and sold through an account opened in the name of "Gerald L. Smith" at Seed Capital Corporation, by use of the means and instruments of transportation and communication in interstate

commerce and by use of the mails, directly and indirectly, (a) employ devices, schemes and artifices to defraud; (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances, under which they were made, not misleading and (c) engage in transactions, practices and courses of business which operate and did operate as a fraud and deceit upon the purchasers; by among other things selling and causing to be sold approximately $1,400,000 in newly issued A.H.P.C. stock certificates which had been acquired in exchange for counterfeit A.H.P.C. stock certificates. 6a

THE MEANS OF THE CONSPIRACY

3. Among the means by which the defendants and their co-conspirators would and did carry out the conspiracy were the following:

(a) During the late spring or summer of 1972, an employee of Manufacturers Hanover Trust Company, the stock transfer agent of A.H.P.C., at the request of the defendants JAMES LEONARD BROWN and ARTHUR DALY, would and did take from the stock transfer department of Manufacturers Hanover Trust Company, certain securities, including among others, A.H.P.C. stock certificates and information from other A.H.P.C. stock certificates and would and did deliver certain of these stock certificates and this information to defendant JAMES LEONARD BROWN and co-conspirators Chester Grey and Frederick Horwitz.

(b) During the summer and fall of 1972, the defendant JAMES LEONARD BROWN, together with co-conspirators Chester Grey and Frederick Horwitz, would and did cause counterfeit duplicates of A.H.P.C. stock certificates to be printed and delivered to co-conspirator Chester Grey and the defendant ROBERT SMITH.

(c) During the summer and fall of 1972, the defendants ARTHUR CAPONEGRO and HARVEY AXELROD, who would and did hold himself out to be "Gerald L. Smith", would and did cause a brokerage account to be opened in the name of "Gerald L. Smith"

at Seed Capital Corporation, a New York brokerage firm registered 7a
with the United States Securities and Exchange Commission, without the authorization, knowledge or consent of the real Gerald L. Smith, who during all relevant times was a retired employee of A.H.P.C. and who owned approximately 18,000 shares of A.H.P.C. stock worth over one million dollars.

(d) During the fall of 1972, the defendants HARVEY AXELROD, who posed as "Gerald L. Smith", and ARTHUR CAPONEGRO, who was affiliated with Seed Capital Corporation, would and did cause various amounts of the counterfeit A.H.P.C. stock certificates to be deposited to the "Gerald L. Smith" account at Seed Capital Corporation.

(e) During the fall of 1972, the defendants HARVEY AXELROD and ARTHUR CAPONEGRO, acting through Seed Capital Corporation, would and did fraudulently cause Manufacturers Hanover Trust Company to exchange 13,000 of the counterfeit A.H.P.C. stock certificates referred to in paragraph (b) above, for 13,000 newly issued A.H.P.C. stock certificates issued in the name of Gerald L. Smith."

(f) During the fall of 1972, the defendants HARVEY AXELROD and ARTHUR CAPONEGRO would and did cause various amounts of such newly issued A.H.P.C. stock certificates to be sold on both the New York Stock Exchange where the A.H.P.C. stock was listed for trading, and in the over-the-counter market, to various customers and broker-dealers. In order to sell these newly issued certificates, the defendant HARVEY AXELROD would and did cause Gerald L. Smith's name to be forged on the documents authorizing the transfer of the certificates.

(g) During the fall of 1972, the defendants ARTHUR CAPONEGRO and QUIDO BENIGNO, who was affiliated with Seed Capital Corporation, would and did cause Seed Capital Corporation to issue checks made payable to "Gerald L. Smith" for approximately $1,400,000. representing substantially all the proceeds of the

sale of the newly issued A.H.P.C. stock certificates to and in 8a
the name of "Gerald L. Smith", and thereafter, the defendant HARVEY AXELROD would and did forge endorsements of the name "Gerald L. Smith" on said checks.

(h) During the fall of 1972, the defendants HARVEY AXELROD and QUIDO BENIGNO would and did cause the checks issued by Seed Capital Corporation and made payable to "Gerald L. Smith", to be cashed by Irving Trust Company.

(i) During the summer and fall of 1972, the defendants, QUIDO BENIGNO, JAMES LEONARD BROWN, ARTHUR CAPONEGRO, HARVEY AXELROD, JOHN KRAPPMAN, ROBERT SMITH, and ARTHUR DALY in the offer and sale of A.H.P.C. stock and as part of a scheme and artifice to defraud and deceive, did make and cause to be made untrue statements of material facts and did omit and cause to be omitted statements of material fact.

OVERT ACTS

4. In furtherance of the said conspiracy and to effect the objects thereof, the defendants and their co-conspirators would and did commit and cause to be committed the following overt acts, among others, in the Southern District of New York and elsewhere:

(a) In or about the early summer of 1972, the defendant JAMES LEONARD BROWN met with co-conspirators Chester Grey and Frederick [illegible]rwitz in New York, New York.

(b) In or about the early summer of 1972, the defendants ARTHUR DALY and JOHN KRAPPMAN met in Brooklyn, New York.

(c) In or about the summer of 1972, the defendants JOHN KRAPPMAN, ARTHUR DALY and JAMES LEONARD BROWN met with co-conspirator Chester Grey in Queens, New York.

(d) On or about May 9, 1972, the defendant JOHN KRAPPMAN took A.H.P.C. stock certificates from the stock transfer department at Manufacturers Hanover Trust Company, 4 New York Plaza, New York, New York.

(e) In or about the late summer of 1972, co-conspirator Frederick Horwitz delivered packages of counterfeit A.H.P.C. stock 9a certificates to defendant ROBERT SMITH and to co-conspirator Chester Grey in New York, New York.

(f) In or about the summer of 1972, the defendants QUIDO BENIGNO and ARTHUR CAPONEGRO and co-conspirator James Phillips posing as "George", met at the offices of Seed Capital Corporation, 61 Broadway, New York, New York.

(g) On or about September 12, 1972, the defendant HARVEY AXELROD, posing as the real Gerald L. Smith, opened a brokerage account and signed a signature account card in the name of "Gerald L. Smith" at Seed Capital Corporation, New York, New York.

(h) On or about October 10, 1972, the defendant HARVEY AXELROD caused shares of counterfeit A.H.P.C. stock certificates to be delivered to the offices of Seed Capital Corporation, New York, New York for deposit into the "Gerald L. Smith" account.

(i) On or about October 11, 1972, the defendant ARTHUR CAPONEGRO caused Seed Capital Corporation to deliver to Manufacturers Hanover Trust Company, New York, New York counterfeit A.H.P.C. stock certificates in the name of "Gerald L. Smith" for transfer into several smaller denominations of newly issued A.H.P.C. stock certificates, also in the name of "Gerald L. Smith."

(j) On or about October 12, 1972, the defendant ARTHUR CAPONEGRO made telephone calls from the offices of Seed Capital Corporation, New York, New York.

(k) On or about October 20, 1972, the defendant ARTHUR CAPONEGRO caused checks in the amount of approximately $242,681. to be drawn on the Seed Capital Corporation account, at Irving Trust Company, New York, New York.

(l) On or about October 20, 1972, the defendants HARVEY AXELROD and QUIDO BENIGNO obtained approximately $200,000 from the Irving Trust Company, New York, New York.

(m) On or about October 25, 1972, the defendants HARVEY AXELROD and QUIDO BENIGNO obtained approximately $273,623. from the Irving Trust Company, New York, New York. 10a

(n) On or about November 8, 1972 the defendant QUIDO BENIGNO obtained approximately $820,578. from the Irving Trust Company, New York, New York.

(o) On or about November 9, 1972, the defendant ARTHUR CAPONEGRO, caused Seed Capital Corporation to deliver to Manufacturers Hanover Trust Company, New York, New York [illegible]rfeit A.H.P.C. stock certificates.

(Title 18, United States Code, Section 371).

COUNTS TWO THROUGH NINE

The Grand Jury further charges:

1. From on or about the dates set forth in Counts Two through Nine below, in the Southern District of New York and elsewhere, the defendants, QUIDO BENIGNO, JAMES LEONARD BROWN, ARTHUR CAPONEGRO, HARVEY AXELROD, JOHN KRAPPMAN, ROBERT SMITH, and ARTHUR DALY, in the offer and sale of securities, to wit, shares of A.H.P.C. common stock, by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, unlawfully, wilfully, and knowingly, did (a) employ devices, schemes and artifices to defraud, (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, and (c) engage in transactions, practices and courses of business which operate and did operate as a fraud and deceit upon purchasers of said securities.

2. The allegations contained in paragraphs 1 through 2 of Count One of this Indictment are incorporated by reference in Counts Two through Nine and repeated and realleged as though fully set forth. The allegations contained in paragraph 3 (Means of the Conspiracy) of Count One of this Indictment are incorporated by reference in Counts Two through Nine and repeated and realleged

as though fully set forth, as constituting and describing some of the means by which the defendants committed the offenses charged in paragraph 1 of Counts Two through Nine.

3. On or about the dates hereinafter set forth in the Southern District of New York the defendants QUIDO BENIGNO, JAMES LEONARD BROWN, ARTHUR CAPONEGRO, HARVEY AXELROD, JOHN KRAPPMAN, ROBERT SMITH, and ARTHUR DALY, unlawfully, wilfully and knowingly did use and cause to be used the mails pursuant to and in furtherance of the scheme and unlawful activity alleged in paragraphs 1 and 2 of Counts Two through Nine, by causing to be transported in the mails in the Southern District of New York, the confirmations of purchase and sale of the A.H.P.C. stock to purchasers and sellers as set forth below:

COUNT	MANNER OF TRANSMISSION	DATE	FROM	TO	MATTER
2	Mail	10-12-72	Weeden & Co. Incorporated 25 Broad Street New York, New York	Seed Capital Corporation 61 Broadway New York, New York	Confirmation of Purchase of 2,500 shares of American Hom Products Corporation Stock
3	Mail	10-13-72	Weeden & Co. Incorporated 25 Broad Street New York, New York	Seed Capital Corporation 61 Broadway New York, New York	Confirmation of Purchase of 1,000 shares of American Hom Products Corporation stock
4	Mail	10-16-72	Weeden & Co. Incorporated 25 Broad Street New York, New York	Seed Capital Corporation 61 Broadway New York, New York	Confirmation of Purchase of 1,500 shares of American Hom Products Corporation stock
5	Mail	10-26-72	Weeden & Co. Incorporated 25 Broad Street New York, New York	Seed Capital Corporation 61 Broadway New York, New York	Confirmation of Purchase of 1,000 shares of American Hom Products Corporation stock
6	Mail	10-26-72	Schweickart & Co. 2 Broadway New York, New York	Seed Capital Corporation 61 Broadway New York, New York	Confirmations of Sale of 2,000 shares of American Hom Products Corporation stock
7	Mail	10-27-72	Loeb, Rhoades & Co. 42 Wall Street New York, New York	Seed Capital Corporation 61 Broadway New York, New York	Confirmation of Sale of 500 shares of American Home Products Corporation stock
8	Mail	10-27-72	Schweickart & Co. 2 Broadway New York, New York	Seed Capital Corporation 61 Broadway New York, New York	Confirmations of Sale of 1,500 shares of American Hom Products Corporation stock
9	Mail	10-30-72	Schweickart & Co. 2 Broadway New York, New York	Seed Capital Corporation 61 Broadway New York, New York	Confirmations of Sale of 3,000 shares of American Hom Products Corporation stock

(Title 15, United States Code, Section 77q(a) and 77x
Title 18, United States Code, Section 2).

COUNT TEN

The Grand Jury further charges:

On or about the 15th day of April, 1973, the defendant HARVEY AXELROD, a resident of New York, New York, unlawfully, wilfully and knowingly did make and subscribe and cause to be made and subscribed in the Southern District of New York, a United States Individual Tax Return, Form 1040, for the calendar year 1972, on behalf of himself and his wife, which tax return was verified by a written declaration that it was made under penalties of perjury, and was filed with the United States Department of Treasury, Internal Revenue Service, and which tax return the defendant did not believe to be true and correct as to every material matter, in that the defendant falsely stated therein that during the period from January 1, 1972 to December 31, 1972, he had gross income of $25,113.56, whereas, in truth and in fact, as the defendant then and there well knew, his gross income for said period was substantially in excess of the stated income and which income was required to be stated in said tax return but was not stated in said tax return.

(Title 26, United States Code, Section 7206(1)).

COUNT ELEVEN

The Grand Jury further charges:

On or about the 15th day of April, 1973, the defendant QUIDO BENIGNO, a resident of Yonkers, New York, unlawfully, wilfully and knowingly did make and subscribe and cause to be made and subscribed, in the Southern District of New York, a United States Individual Tax Return, Form 1040, for the calendar year 1972, on behalf of himself and his wife, which tax return was verified by a written declaration that it was made under penalties of perjury, and was filed with the United States Department of Treasury, Internal Revenue Service and which tax return the defendant did not believe to be true and correct as to every material matter, in that the defendant falsely stated therein

he had gross receipts from his self employment of $26,860.00 and he and his wife had gross income of $22,011.12, whereas, in truth and in fact, as the defendant then and there well knew, his gross income for said period was substantially in excess of the stated income and which income was required to be stated in said tax return but was not stated in said tax return.

(Title 26, United States Code, Section 7206(1))

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

XXX

THE COURT: I am going to accept the application and direct daily copy on the assumption that on the basis of a proper showing of indigence, arrangements can be made through CJA. If it turns out that I am wrong in that, we will have gone along for a day or so without irreparable harm. But I would be grateful if financial status and hardship affidavits could be prepared by both of your clients and get them to me in chambers as quickly as you can.

We will do some further considering as to my own power and authority in the matter, and on that assumption let's go forward on a daily copy basis, subject to the project being aborted if I discover to my own reluctance that I simply can't do it. I am telling you that I want to do it and will if I can.

(In open court)

H A R V E Y A X E L R O D , called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

XXX BY MR. LUTZ:

Q Mr. Axelrod, in connection with this case, do you have any agreement with the government?

A I do, sir.

Q Would you briefly tell us what that agreement is?

A I have agreed to be a witness for the government. I have pled guilty to two counts, a securities count and a tax evasion count, and the government has agreed to testify on my behalf.

Q Mr. Axelrod, I have here an exhibit marked Governemnt's Exhibit 1 for identification. Will you take a look at that agreement and tell me, please, if you can identify that agreement?

A Yes, sir. This is the agreement that I signed, sir.

Q This is the agreement that you signed with whom?

A With the government.

MR. LUTZ: At this time the government would offer this into evidence.

THE COURT: Any objection?

MR. POLLACK: Yes, your Honor, as to relevance.

THE COURT: Mr. Klempner, do you press an objection?

MR. KLEMPNER: I have no objection.

THE COURT: I will receive it.

(Government's Exhibit 1 received in evidence)

MR. LUTZ: At this time the government would ask permission to read the agreement to the jury.

THE COURT: Yes, you may proceed, Mr. Lutz.

(Government's Exhibit 1 was read to the jury)

BY MR. LUTZ:

Q Mr. Axelrod, directing your attention to 1972, what was your employment during that time?

A I was the president of the corporatin, namely Carlson Originals, located at 512 Seventh Avenue.

Q What type of business was Carlson Originals?

A Manufacturer of ladies apparel.

Q Mr. Axelrod, have you ever used any nicknames or assumed named?

A Yes, sir.

Q What names or name?

A The name Gerald L. Smith, sir.

Q When did you use the name Gerald L. Smith?

A Towards the middle and latter part of 1972, sir.

Q Did you know a person named Gerald L. Smith?

A No, sir.

Q Did you ever receive authorization to use the name Gerald L. Smith?

A No, sir.

Q In what connection did you use the name Gerald L. Smith?

A I used the name Gerald L. Smith for the signing of various documents, and included an opening of a brokerage account, of stock authorization papers, transfer papers and various securities in American Home Products.

Q Where did you open this brokerage account in the name Gerald L. Smith?

A At the office of Seed Capital, a brokerage firm in the lower part of Manhattan. I believe 61 Broadway.

Q When was that?

A In the middle of September, sir.

Q Of what year?

A 1972.

Q How did you come to be involved in these activities in the first place?

A I was approached by a very personal friend of mine, namely James Phillips, who had been the major partner in a brokerage office named Phillips, Appel & Walden, who approached me in my offices on Seventh Avenue to say that he could acquire stolen securities, and if I would be

interested in the disposition of same.

Q What did you say?

A I said that I was.

Q Do you recall approximately the date or when this was?

A This would have been either in June or July of 1972.

Q Besides yourself and Mr. Phillips, was anyone else present?

A No one, sir.

Q In substance, what was the discussion about, if you any?

A He outlined the scheme, that he was able to get stolen securities of American Home Products, that the people that he was associated with had contacts with the transfer office that handled American Home Product, and he wondered if I would be able to dispose of it, and we discussed the proceeds of same and a split of the monies that would be derived from the sale of the stolen securities.

Q At that time what was the split of monies to be, as you recall?

A Fifty percent to the people that were able to obtain the securities and fifty percent for Mr. Phillips and myself.

Q At this point did you know who the people were that were able to obtain the securities?

A No, sir.

Q After you met with Mr. Phillips on this deal, what if anything happened next?

A I contacted a relative of mine who was associated with a brokerage office, namely Seed Capital, and asked him if he would be interested in handling securities of a dubious nature.

Q Did he respond?

A He says he was interested.

Q Then what happened?

A I gave this information to Mr. Phillips and arranged an appointment with him the following day to go down to see Mr. Benigno, which he did do. Then he reported back to me.

Q When he reported back to you, what did he tell you?

A He told me that Mr. Benigno was interested in the sale of the securities, that he had the know-how, and he was interested in the proposition of taking fifty percent of our side, Mr. Phillips and myself.

MR. POLLACK: Your Honor, I will object to all of this testimony on the part of the defendant Brown

* * *

he came back and reported back to you? You and he had a discussion.

Did you say something to him and did he say something to you? Can you tell us what?

A To the best of my recollection, Mr. Phillips then arranged a meeting with myself --

Q Did he say something? You have to say what he said. You can't draw conclusions. You have to tell us what he said to you and what you said to him.

A Mr. Phillips told me that Mr. Benigno was interested in the disposition of the stocks, and he had all the facilities for it. This is something that he definitely told him. And Mr. Phillips told me that Mr. Benigno was interested -- had agreed, he had agreed to the division of the proceeds of the money.

Q What was that?

A That was twenty-five percent for Mr. Benigno and his group, twenty-five percent between Mr. Phillips and myself, and fifty percent for the people who would get the stocks -- to get these stocks out of the transfer office.

Q Did you have any meetings after this witn anyone regarding this scheme?

A Approximately a week or two afterwards, Mr.

Phillips came to me and he arranged a meeting with a Mr. Chet Grey, which took place that evening at a restaurant in Manhattan on Third Avenue, namely the Sign of the Dove, where we all met as principals in a project and discussed the --

MR. POLLACK: Objection to the characterizations of how they met, your Honor, and ask only what was said by whom --

MR. KLEMPNER: Judge, I will object to the statement they all met.

THE COURT: I will sustain the objection to the characterization, with particular reference to the word principals.

As far as "we all met," let's focus a bit more closely on who was there.

Q Who met at this particular restaurant and what was said?

A Mr. Phillips, Mr. Chet Grey and myself.

Q What was discussed, if anything?

A We just discussed -- Mr.Grey explained to us the details of the scheme, and that we would be going ahead shortly.

Q What other meetings, if any, did you have after this regarding the scheme?

A Approximately two weeks afterwards --

Q Approximately when is this? When you say two weeks, you have said that a couple of times, what date?

A The end of July, beginning of August.

Q Of 1972?

A Of 1972. Mr. Phillips came to my offices and told me he had arranged for a meeting in Queens.

Q Was there a meeting in Queens?

A Yes, there was a meeting in Queens.

Q Would you tell us the circumstances, how the meeting took place and who you met with?

A A person that we referred to by the name of Captain Bob picked Mr. Phillips and myself up in Manhattan and drove us to a German restaurant in Queens, I believe on Queens Boulevard.

Q Then what happened?

A A fourth party came into the restaurant whom we referred to as Moustache, and who I was introduced to as Mr. Jim Brown, and we sat down to have coffee and cake.

Q Would you look around the courtroom and tell us if you see this individual Moustache or Jim Brown here today?

A I do, sir.

Q Would you point him out to us?

A The gentleman on the left at that table, sir.

MR. POLLACK: The identification is conceded, your Honor.

MR. LUTZ: May the record reflect Mr. Brown was identified by the witness.

Q At this meeting was there any discussion after you were introduced?

A Mr. Brown advised us that Mr. Chet Grey was going to jail shortly, and that he would handle the -- he would handle the scheme from then on in himself --

Q "Scheme," referring to what?

A The general plan of the sale of the stolen securities of American Home Products, and that he would show same to us, namely Mr. Phillips and myself, in approximately a few weeks.

Q You keep saying "same." What is "same"?

A The stolen securities. He would show us samples or the securities within a few weeks time.

Q Was there any other meeting that you recall with these individuals?

A Approximately two or three weeks afterwards, the person referred to as Captain Bob picked up Mr. Phillips and myself,again in Manhattan, and drove us into Queens

where we parked in a parking lot on Queens Boulevard, and Mr. Brown entered the car.

Q What happened?

A He then had a manila envelope which he opened up and showed us samples of securities.

Q What kind of securities?

A He then told us that they were, not stolen, but they were counterfeit securities of American Home Products that were in the process of being made. There were no certificate numbers on them, and there were no amounts of shares. He did have one original that we could use as comparison.

Q What did you do,what happened with the certificates at that meeting?

A Mr. Phillips and I looked them over and I informed Mr. Brown that I would have to show them to the people that I dealt with that were supposed to dispose of them to see if they would handle them if they were counterfeit securities.

Q Was there any other discussion about these certificates, these counterfeit certificates, at this time?

A Mr. Brown just pointed out how well the securities were made, even to the printing or the writing

of the little dots on the certificate papers, to show how fine they were done and how close to the originals that they were.

Q Were there any names on these certificates? You said there were no numbers.

A There were no names and no numbers.

Q About this same time were there any other meetings that you had that you recall after this one?

A After this I had a meeting with Mr. Benigno in my offices, and I showed him the samples of the counterfeit securities, plus one original one that was given to me.

Q Where had you gotten these counterfeits, these samples?

A They were given to Mr. Phillips who delivered them to my office the next day.

Q By whom were they given?

A By Mr. Brown.

Q Were you there when he got them?

A Yes.

(Continued on next page)

* * *

Put the question again.

Q Was there any discussion when you gave Mr. Phillips those certificates as to whom he should take them to?

A No. He just said he would take them to the proper people to get them refinished.

Q Did he tell you specifically who he was taking them to?

A I absolutely do not recall, sir.

Q Then what happened next in this scheme?

A Mr. Phillips and I then went down to the offices of Seed Capital where we proceeded to open up a brokerage account and to discuss certain aspects of the scheme.

Q Approximately what was the date of this?

MR. POLLACK: Your Honor, I will object to the conclusory statement, "discussed certain aspects" of whatever scheme he is speaking of.

I ask the witness to be instructed to state what was said to him, what he said, and what he did.

THE COURT: That is a preferable form of questioning, Mr. Lutz.

Q You say you went down to Seed Capital. When was that?

* * *

plan. Mr. Phillips and I just decided that we would proceed with the plan, that I would sign the name Gerald L. Smith to all the -- actually, the certificates came to us in duplicate. There were two copies of every certificate, of which we selected the best ones of the two.

I then proceeded to sign the backs of the certificates with the name Gerald L. Smith.

Q How many certificates did you sign, do you recall?

A There was a total of 18,000 shares of American Home Proceeds; two for 5,000 and eight for 1,000.

Q Were there numbers on these certificates?

A These certificates had no numbers. These certificates had the numbers -- all the numbers and all the certificate amounts on them, but no name.

THE COURT: If I am following this, Mr. Axelrod, you signed the name Gerald L. Smith on a total of ten certificates, two of them were for 5,000 shares each; is that right?

THE WITNESS: That's right.

THE COURT: Eight of them were for 1,000 shares each?

THE WITNESS: That's right, sir.

THE COURT: So that is ten certificates

totaling 18,000 shares?

THE WITNESS: That's right.

Q Where did you sign your name?

A I signed my name on the back of the certificates.

Q The name you signed was Gerald L. Smith?

A Gerald L. Smith. There was no name on the front.

Q After September 12 did you ever have occasion to visit Seed Capital again?

A Yes, I went down with Mr. Phillips with one 5,000 share certificate.

Q Did you meet with anybody at Seed?

A We met with Mr. Benigno. We went into his private office where he typed in the name Gerald L. Smith on the front, on the face of the certificate.

He then proceeded to send the certificate in for transfer.

Q Were you present when he did that?

A Yes.

THE COURT: Tell me that again. What did he do? He then sent it where?

THE WITNESS: In for transfer.

Q Would you describe the physical certificate

* * *

* * *

was in each bundle?

A I can't tell you how much money was in each bundle. I can tell you the percentages.

Q Will you tell us that?

MR. POLLACK: Objection, your Honor.

THE COURT: Overruled.

A The percentages were 25 percent for Mr. Benigno and his group --

MR. POLLACK: Objection, your Honor.

THE COURT: On what basis?

MR. POLLACK: The question was what percentage was in the bundle and not the purpose.

THE COURT: Let's keep with the percentages for the time being.

One bundle was 25 percent?

THE WITNESS: One bundle had 25 percent; one bundle had 12-1/2 percent; another bundle had 12-1/2 percent; and the fourth bundle had 50 percent, sir.

Q If you know, to whom were these bundles to go?

A The first bundle of 25 percent was for Mr. Benigno, which he then put into his private safe.

The second bundle was for myself.

The third bundle was 12-1/2 percent which we

designated for Mr. Phillips.

And the fourth bundle was 50 percent which we designated for Mr. Brown and company.

Q After the money was broken down into the four bundles and after Mr. Benigno had put his bundle in his safe, what did you do?

A We took the three remaining bundles. Mine I put into my pocket, and the other two into a small package, and we drove in Mr. Benigno's car where he dropped me off at my apartment, and I gave the remaining two bundles to Mr. Phillips.

Q The two bundles you gave to Mr. Phillips represented what percentage of the --

A 12-1/2 percent for Mr. Phillips and 50 percent for Mr. Brown and company.

THE COURT: Mr. Lutz, I think we will take a short recess here. We will recess for about five minutes, five or ten minutes.

(Recess)

(In open court; jury present)

Q Mr. Axelrod, you just testified that you went down to Seed Capital on October 20, 1972.

After that visit to Seed Capital, did you make any other visits to Seed Capital?

13 lhmch Axelrod-direct

A Approximately five days later, the same procedure evolved.

I was called by Mr. Benigno, I went down to the offices of Seed Capital, and this time I signed one check for approximately $275,000, and Mr. Benigno -- I signed the name Gerald L. Smith to the back, excuse me, Jerry sir, and Mr. Benigno and I then went across to the bank where we picked up the cash and returned to the offices of Seed Capital and again put them into four distinct piles.

Q Then what happened?

A The piles were again in the same denominations 25 percent, 12-1/2 percent, 12-1/2 percent, and 50 percent.

Mr. Benigno took his 25 percent and put it into his safe; I took my 12-1/2 percent and put it into my pocket, inside pocket; the other two piles were put into a large package.

Q For whom were the other two piles?

A One for Mr. Phillips --

Q What was the percent?

A 12-1/2 percent.

And the other one was for Mr. Brown and his group, which was 50 percent.

Q Then what happened?

A Mr. Benigno and I then took a taxicab. He

dropped me off at my apartment house. I then gave Mr. Phillips his 12-1/2 percent, and the other remaining package of 50 percent.

Q I show you Exhibit 5 for identification and ask if you can identify that? Turn it over and look at it, please.

A Yes, sir. This is a check made out to Gerald L. Smith that I signed the name Gerald L. Smith on the back.

Q Is this the one you just described?

A That's right, sir, October 25, sir.

MR. LUTZ: Would you like to see it?

MR. KLEMPNER: No. Mr. Daly has no objection.

THE COURT: Received.

xxx (Government's Exhibit No. 5 was received in evidence.)

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Q Mr. Axelrod, what was this check for?

A This was the check for the first 5,000 shares of American Home Products that we sent in to transfer.

Q This was for transferring it?

A No, this was the proceeds.

Q From what?

A From 5,000 shares of American Home Products.

Q What happened to the American Home Products?

A It was sent in for transfer to the transfer agent.

Q Then what happened to them? Did Mr. Benigno tell you what happened to them? Were they sold?

A They were sold to Weeden & Company.

Q Mr. Benigno told you that?

A Yes, sir.

Q What is the amount of this check?

A $279,207.50.

Q On what bank is it drawn?

A Irving Trust Company.

Q Where was it cashed, again?

A At Irving Trust Company.

Q What is the next event in this scheme that you recall, if any?

A The following day we sent the balance -- Mr. Phillips took down the balance of the certificates, which was 13,000 shares of the counterfeit certificates to the offices of Seed Capital.

Q Did you give them to Mr. Phillips and accompany him down there or --

A He delivered them himself and he came back to tell me that he had delivered them, and he gave the instructions to Mr. Benigno to take 8,000 shares of the certificate and send them in for transfer.

Q Will you describe these 13,000 shares to us?

A There was one 5,000 share certificate and eight 1,000 share certificates.

Q What were the names on the certificates? What kind of stock?

A The stock was American Home Products. There were no names on the front, but the certificate numbers and the numbers of the shares were printed on them.

Q Was there anything on the back of the certificate --

A The signature Gerald L. Smith that I had signed.

Q You signed each of the certificates?

A Each one.

Q After this, did you have occasion to go down to Seed Capital any more times afterwards?

A Approximately a week later I was called by Mr. Benigno. He had received the checks from Weeden & Company that he had sold it to, and --

Q Are you sure that -- you said Weeden & Company. You said the first shares were sold to Weeden & Company before.

Do you know to whom these shares were sold?

A I am not 100 percent sure.

MR. POLLACK: Your Honor, I object to counsel leading his witness before his recollection is exhausted.

THE COURT: The testimony, as I understand it, is that the witness is now not sure in his own mind to whom the sale was made.

Q Did there come a time when you went back down to Seed again?

A Yes, sir. I cam down to pick up the proceeds of the sale of 8,000 shares of American Home Products.

Q With whom did you meet?

A With Mr. Benigno.

Q Would you tell us what happened, please?

A I signed stock transfers, stock authorization papers -- stock power, stock power papers, I am not familiar

too much with the market, and so that I would not have to return to the bank myself, Mr. Benigno went to the bank and came back with the proceeds of the sale of 8,000 shares of the American Home Products, which totaled approximately $875,000.

Q Where did he get the money from?

A He got it from the Irving Trust Company.

Q How did he get it?

A From the sale of the 8,000 shares of certificates.

Q Did you sign anything else besides this thing you said, the power for Mr. Benigno to go to the bank?

A I signed the back of the check. I signed the back of the check.

xxx

(Government's Exhibit No. 6 was marked for identification.)

THE COURT: While we are going through this marking, ladies and gentlemen of the jury, let me say something to you. It occurs to me that a moment ago I said in response to Mr. Pollack's objection, "The evidence is so-and-so." It occurs to me that in saying that I departed from my own rules that I told you of at the beginning of the trial. It is your recollection of

the evidence that counts on all points, not my own, and I consequently reproach myself for expressing my own understanding of the evidence. The evidence is entirely up to you.

Q You said Mr. Benigno went to the bank. What were you doing?

A I waited in his office under locked doors, in his office, for him to return with the money.

Q Did he in fact return with the money?

A He retirned with two -- the size of two packages like food, carrying packages filled with cash.

Q Approximately how much cash was this, do you recall?

A Approximately $875,000.

Q I show you Government's Exhibit 6 for identification and ask you if you can identify that.

A That's a check that I signed the name Gerald L. Smith to on the back for $837,325.

Q Is this the check you just referred to?

A Yes, sir.

Q As having signed?

A Yes, sir.

Q Is this the check which Mr. Benigno -- you gave him to take to the bank to cash?

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THE COURT: Hold on. Mr. Axelrod, what you must do is to listen to Mr. Pollack's questions and to answer the questions that he asks you, to the best of your ability.

THE WITNESS: Yes, sir.

Q Is it not a fact that James Brown never personally told you he was to receive fifty percent of the proceeds of your transactions with Seed Capital?

A Truthfully I can't exactly recall, sir.

Q Is it not a fact --

A I can't recall.

Q -- that you never personally gave any money to James Brown?

A I never gave any money to James Brown.

Q And is it not a fact, sir, that most of what you testified to here yesterday was said to you by Mr. James. Phillips?

A Yes, sir.

Q And Mr. Phillips had been introduced to you by this Captain Bob?

MR. LUTZ: I object to "most of what you said." What is Mr. Pollack referring to?

THE COURT: Perhaps you could be more precis

Q Everything you testified to concerning the

* * *

A I have no idea. If you care to bring out the amount in hundred dollar bills, we will measure it out again and we will see what it is. It is not that difficult, sir.

Q Mr. Axelrod, you gave the money to Mr. Phillips in your lobby?

A Yes.

Q Where in the lobby?

A It is a small lobby.

Q You just passed him an envelope --

A I just passed him a container, I don't know the exact size of the container, but I passed him the amounts of money.

Q Had youcalled him and told him to be there?

A Yes, sir.

Q When did you call him?

A I called him from Mr. Benigno's office.

Q Mr. Phillips lived at East 78th Street, did he not?

A I have no idea. In that area.

Q Where did you call him?

A At his apartment. I had his number.

Q He lived on the East Side, correct?

A On the East Side, in the seventies.

Q Was it a penthouse apartment?

A Was his apartment a penthouse apartment?

Q Yes.

A I was never in his apartment, so I really can't answer you.

Q What happened to the money after you gave it to Mr. Phillips?

A Mr. Phillips left me and what he did with the money was strictly his concern, not mine.

Q You never saw it again, correct?

A No, sir.

Q It was never given back to you?

A No, sir.

Q You were never asked to do anything with it?

A No, sir.

Q That brings us to the third time. This is the time you talk about $875,000?

A Yes, sir.

Q Did you sign --

MR. LUTZ: Excuse me. I think the correct amount of the check is $837,000, and it is in evidence.

THE COURT: It is evidence, it is Government Exhibit 6, and in case the jury may have forgotten the precise amount, I will state that it was $837,325.

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Q You had on your person $852,000 minus 25 percent, right?

A Yes, sir.

Q 25 percent is 210, you had, say, $600,000, to round it off, correct?

A I don't know. If you say so. I am not a mathematician. It is not my forte.

Q Did Mr. Benigno have his money --

A Mr. Benigno's money went into his safe.

Q So there was no interest in Mr. Benigno in protecting any money that was in that cab, is that correct?

A No.

Q Yet he was the one that took the bodyguard, not you?

A Yes.

Q Where did Mr. Benigno go?

A After he left me?

Q Where was he going?

A With me?

Q Yes.

A We went uptown, followed the same procedure as the other two times.

Q He dropped you off?

A Dropped me off.

* * *

A No. He accompanied me three times.

Q If the money were lost, it was your obligation and responsibility to Mr. Phillips, is that correct?

A I would say so.

MR. LUTZ: He is asking the witness to guess and he covered this area several times.

MR. POLLACK: I am trying to cover it. I am not getting an answer.

THE COURT: It is not a guess. He is asking him what his own responsibility was for the money in relations to Phillips. I will permit the answer, although we have been over it a few times, Mr. Pollack.

Q You were a conduit in your mind for that money, weren't you?

A What's the word conduit mean?

A You were a messenger?

A If you want to call it a messenger, yes.

Q On this occasion you took $600,000 to the East 60's, correct?

A Yes, sir.

Q East 68th Street?

A Right.

Q You got out of the cab on the corner again?

A Yes, right.

Q Did you meet your wife?

A Yes.

Q At the bank?

A Yes.

Q You went to your vault?

A Yes.

Q You went to your little room?

A Yes, sir.

Q You put the money in?

A Yes, sir.

Q Then what did you do?

A I saw that the vault was closed, and I left and I went to meet Mr. Phillips.

Q You met Mr. Phillips in the lobby of your apartment?

A At this time I either met him in the lobby of my apartment or I met him up in my apartment house.

Q He couldn't get into your apartment until you got there, correct?

A He could have.

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MR. LUTZ: As to that last question, Mr. Pollack is asking for a conclusion, unless Mr. Axelrod actually knows how Mr. Phillips got where he got.

THE COURT: I confess I have forgotten the

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THE COURT: We can start with your next witness, Mr. Lutz.

MR. LUTZ: The next witness is Winfield Schweickart.

W I N F I E L D S C H W E I C K A R T,

called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LUTZ:

Q Mr. Schweickart, sir, how are you currently employed?

A I am retired at this time.

Q Directing your attention to the year 1972, were you employed at that time?

A Yes, sir. I was General Partner and Manager of Schweickart & Company.

Q Where was Schweickart & Company located in '72?

A We were at 2 Broadway, Manhattan.

Q What type of business did Schweickart & Company engage in at that time?

A We conducted a general brokerage business in securities.

Q As managing partner of Schweickart & Company,

what were your duties in 1972?

A My duties consisted of general supervision of the back office of the firm, the back office operation.

Q Specifically, what did that involve?

A That involved the following through of transactions as they were executed and proceeded through the entire operation of data processing and the final mailing of them.

Q Mailing of what?

A Confirmations.

Q As managing partner in 1972 of Schweickart & Company, were you also familiar with the back office procedures for all record keeping?

A Yes, sir, I was.

Q Particularly as regarding confirmations, would you tell us what those procedures were?

A As an order is executed in the Order Department, it is then reported to the Data Processing Department of the firm. The Data Processing Department prepares a confirmation, which is a notice to the customer of the detail of his transaction, and as the data processing produces this confirmation it also puts on there all of the detail of the transaction, the number ofshares, the name of the stock, the price and the final money.

Simultaneously it prints the name and address

of the customer on this confirmation. The confirmation then goes from the Data Processing to the Mail Department. The Mail Department immediately puts it in envelopes and they are mailed during the day in the normal course of business.

x xx (Government Exhibit 10 was marked for identification.)

Q I show you Exhibit 10 for identification, which consists of approximately 22 documents. Can you identify that, sir?

A Yes, sir. These are original confirmations of the kind sent to customers showing the detail, the number of shares of securities sold and the name of the stock, American Home Products, and the price, after incorporating the 115-1/2 to 116, and the final money which the customer will receive when the stock is delivered.

It also carries the name of the customer, Seed Capital Corporation, with the address.

Q Were these confirmations kept in the usual and normal course of business?

A Yes, sir, they were. The originals were mailed and an exact duplicate was kept on file in the firm.

Q Were these made at or about the date appearing on these confirmations?

A There are two dates on these confirmations, one being the trade date when the actual execution of the order took place, and the other is a settlement date, the date on which delivery and settlement would be made. In this case the trade date appears as October 26, 1972 and it follows through with varying dates.

Q Were these confirmations prepared on or about one of those two dates?

A They would be done on the trade date, yes, sir.

Q In connection with your work at Schweickart & Company, have you ever heard of the firm Seed Capital Corporation?

A Yes, sir, I have.

Q If you know, has Schweickart & Company ever had any business dealings with Seed Capital?

A Yes, we did. We had business with them in the latter part of October of 1972.

Q Would you describe for us, please, what those dealings were?

A We sold stock of American Home Products, the sale having taken place on the New York Stock Exchange, and the total of these shares over two or three days, I believe itwas three days, totalled 6500 shares.

Q Whom did you sell these shares for?

A We sold them for the account of Seed Capital Corporation.

MR. LUTZ: At this time the Government would like to offer these confirmations, 22 in number, in evidence.

MR. POLLACK: No objection, your Honor.

MR. KLEMPNER: Mr. Daly has no objection.

THE COURT: They may be received.

xx (Government Exhibit 10 for identification was received in evidence.)

Q Mr. Schweickart, would you look at each of these confirmations and tell us the dates on which the transactions occurred, if you would? Lump the specific dates.

A On October 26th we find 800.

THE COURT: That's 800 shares?

THE WITNESS: Yes, sir.

A (Continuing) And 3 is 11, 13, 1300, 1500.

Q Just what dates the transactions occurred.

A It is all on one day, the 26th. 2000 shares.

Q There was a transaction on the 26th?

A October 26th.

Q Or several transactions?

A Several transactions aggregating 2000.

Q What was the next date of the transactions?

A October 26th we find sales of --

Q That's sufficient. After the 27th, when was the next transaction?

A October 30th.

Q So that was the 26th, 27th, 30th, three days?

A That's right.

Q You testified that these confirmations were mailed. Did you mail them personally?

A No, I did not.

Q How do you knowthat these documents were mailed?

A In the normal course of business. As I had mentioned to you previoulsy, the confirmations were produced by the Data Processing and automatically delivered to the Mailing Department. That was the process that we followed.

Q Would there be any time when confirmations would not be mailed?

A No. It was our obligation to mail them, under the rules of the New York Stock Exchange.

Q So a transaction with the name and address of the customer only would be mailed, is that correct?

A That's correct.

Q From where would these be mailed?

A They would have been mailed from 2 Broadway, our home office address.

Q Do you recall specifically to whom they were mailed?

A They were mailed to the name of the customer, in this case Seed Capital Corporation.

Q Do you recall the address?

A 61 Broadway, New York.

MR. LUTZ: No further questions.

MR. POLLACK: Very briefly, your Honor.

THE COURT: Then we will see if we can conclude before lunch.

CROSS EXAMINATION

BY MR. POLLACK:

Q Mr. Schweickart, do you know James Leonard Brown?

A I don't think I do.

Q Did you send any of these confirmations to him?

A I am afraid I didn't hear the name, sir. Brown?

Q Brown.

A No, not directly.

Q Mr. Schweickart, these confirmations, they are sent out when your company has sold stock to somebody else?

A That's correct.

Q They are given to the party for whom you sold it?

A They are mailed to the party for whom they are

sold.

Q This is Seed Capital Corporation, correct?

A That's right.

Q How far is 61 Broadway from where you are?

A I would say it was a block, perhaps.

Q Is it within the realm of possibility that somebody could have picked the confirmations up?

A I wouldn't know that.

Q Has it ever happened, to your knowledge?

MR. LUTZ: He is asking the witness to guess, your Honor.

THE COURT: We opened the inquiry of normal procedure. Mr. Pollack is following along with that.

I didn't hear the answer.

A It is notpossible because the Exchange rules prohibit it.

Q Do you know for a fact that these were not picked up, sir?

A I do not know for a fact.

Q Do you know for a fact that these were mailed to Seed Capital Corporation, 61 Broadway, New York, New York?

A In the normal course of business they would have been, yes, sir.

Q I ask you, sir, as to each of these particular confirmations, do you personally know for a fact that they were mailed?

MR. LUTZ: Your Honor, again he asked the question. He is asking the witness to guess. He said he didn't have any knowledge, he didn't do it himself.

THE COURT: Overruled.

A I do not know personally.

Q On the Stock Exchange, when stocks are sold, you make settlement for the person you sold them for, right?

A That's right.

Q You are acting as a clearing house in this situation?

A We are acting as an agent for the customer.

Q Correct. You have to receive the stock to sell it, correct?

A That's correct.

Q How did you receive the stock evidenced in these certificates?

A The stock was delivered by messenger to our Cashier's Department --

Q Then you sold it?

MR. LUTZ: Your Honor, we do have a stipulation with regard to the delivery of the stock. We read

MR. POLLACK: I will not be long, if the Court will indulge me.

THE COURT: I will let you go on.

THE WITNESS: We sold it before the delivery.

Q Then it was delivered by messenger?

A Yes.

Q You gave a company check to the messenger in return to Seed Capital?

A Yes, sir.

Q When did that occur in relation to the preparation of the confirmation?

A In each instance it occurred on the settlement date appearing on this confirmation.

Q The settlement date was shortly after the trade date, is that correct?

A A week, seven days.

Q Is that period allowed so that the check you receive from the buyer will clear?

A No. That is not the purpose of it. That is authorized procedure on the Exchange.

Q The only purpose of the confirmation is to alert the individual that the transaction he has asked to occur has in fact occurred?

A That is true, yes.

Q It has nothing to do with delivery, receipt, sale or payment?

A It does supply the amount of money that is due the customer, which I mentioned before was indicated on each confirmation.

Q Would the confirmation indicate the amount that each share was sold for?

A That's right.

Q Does the customer detail when it makes the authorization to sell what it will accept in payment?

A Naturally. The custom-r would naturally be subject to this confirmation.

Q In other words, the customer can reject the price the company received?

A No, he cannot. If there were an objection to the price, he would object at the time of the execution, not at the time he received the confirmation.

Q The execution would be what?

A The day on which the order went in and was executed on the Stock Exchange.

Q He is in formed of that?

A Yes, sir.

Q He is informed of that before the confirmation?

A Yes, sir, he is.

Q So before he gets this he knows his stock has been sold.

A That's right.

Q He knows the price of his shares

A That's right.

Q He is informed of that how?

A He is informed of that by the registered representative who handles the account.

Q Personally on the Exchange?

A By telephone.

Q Do you know who made the telephone calls regarding the information?

A It would be a guess. I know the name, but I can't verify that he did it.

Q Do you know who you dealt with at Seed Capital?

A Caponegro. I didn't deal with him. The customersman did.

Q The customersman?

A Yes.

MR. POLLACK: No further questions.

THE COURT: Mr. Klempner?

MR. KLEMPNER: I have no questions.

MR. LUTZ: Brief redirect.

THE COURT: Yes, sure.

REDIRECT EXAMINATION

BY MR. LUTZ:

Q Mr. Schweickart, Mr. Pollack asked you if the particular person at Seed Capital was notified about the transaction, after it occurred, by telephone. Do you have personal knowledge of that?

A I do not have personal knowledge. It is a matter of procedure.

Q When that type of information is relayed, does it refer to the total mount of information that's on the confirmation or just to the fact that transactions occurred?

A The fact that the transaction has occurred and the price at which it was executed.

Q Would the price at which the transaction is executed necessarily be the same amount of money that the seller would be receiving?

A It would, if you extend out the shares times that price.

Q Would there be other charges?

A There would be commission, and in the case of sales there is a tax deducted also.

Q There were a number of transactions, you said, for each day which Schweickart & Company executed for Seed Capital, is that right?

A Yes.

Q Did the broker ever tell you at your firm that he had called Seed Capital every time a transaction went across?

A He didn't tell me. He told the board room manager.

Q So what is the purpose of the confirmation, then?

A The confirmation is to give the actual figures that result from the transaction.

Q That is so that at delivery what can happen?

A At the delivery date thecustomer would send in his shares and demand that amount of money appearing on the confirmation.

Q So it formalizes the contractual relationship in the brokerage business?

A That's correct.

Q You said in the normal course of business confirmations with the name and address of the customer are always mailed; is that correct?

A That's correct, yes, sir.

Q Wouldyou tell us specifically how that happens, with regard to after the confirmation comes off the computer? What specifically happens? Do you have a special section in your office?

A As the computer produces this confirmation and extends the figures, it also prints this with a number of copies. The original copy goes to the Mail Department, who inserts it in a window envelope and mails it immediately.

Q With the name and address --

A The name and address is supplied by the Data Processing.

Q Would it matter whether the customer you were dealing with was right in the same building with you or next door to you or in another state, as to whether or not you mailed it?

A We would still have to mail it.

Q Is it possible that if there were no address but a name and delivery instructions, that that confirmation might be hand delivered?

A Not in our procedure, no, sir.

MR. LUTZ: No further questions.

THE COURT: Mr. Schweickart, help me a bit more on the mechanics, if you would. We have seen these confirmation slips. By those confirmation slips your firm, as I understand it, is telling Seed Capital, your customer, how much money Seed Capital is eventually going to receive as a result of the transaction, is that right?

THE WITNESS: That is right, your Honor, yes.

* * *

* * *

Q The only thing he doesn't know is the amount of tax and commission to be deducted?

A That's correct.

Q There have been occasions where the seller and buyer are both on the floor together and your representative can just walk across and say, "I just sold the stock you gave me."?

A Not the customer, no. The brokerage procedure is entirely an internal affair. Our broker on the floor of the New York Stock Exchange receives a customer's order from our Order Department by telephone. He goes to the post on the floor where the stock is traded and asks for a bid. Receiving it, he then concludes the contract on the floor of the Exchange.

Q Is it possible the seller has a representative on the floor?

A Not Seed Capital. They aren't members. They were not members.

Q So you know that a call was made to Seed Capital?

A By our representative.

Q If the trade date is 10/26/72, as it is on this top one, which indicates an amount due of $23,011.53, a call would be made on 10/26?

A That's right.

Q They uwould be informed as of that moment of sale?

A He would be informed immediately, yes, sir.

MR. POLLACK: No further questions.

THE COURT: Mr. Klempner?

MR. KLEMPNER: I have nothing.

THE COURT: Mr. Lutz?

MR. LUTZ: No further questions.

THE COURT: Mr. Schweickart, you are excused, and thank you for your attendance.

(Witness excused)

THE COURT: Ladies and gentlemen, we will now adjourn for lunch. Come back, please, at 2.15.

(Luncheon recess)

Tk 1A PM

hb-1 AFTERNOON SESSION 354

2:20 P.M.

(In open court; jury present.)

MR. LUTZ: The next witness, your Honor, is James Avena of Weeden & Company.

J A M E S M. A V E N A, called as a witness by the Government, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LUTZ:

Q Mr.Avena, sir, how are you currently employed?

A I am employed as operations manager of Weeden & Company.

Q What is the address of Weeden & Company?

A 25 Broad, New York, New York.

Q What type of business does Weeden & Company engage in?

A Weeden & Company is a dealer in stocks and bonds.

Q Was this the case throughout the year 1972?

A Yes,sir.

Q What particular position did you say you had with Weeden & Company?

A I was the operations manager.

Q That was true in '72 also?

A Yes.

Q As operations manager, what were your duties?

A My duties as operations manager was to process all transactions done by the New York office of Weeden & Company and to maintain those records. By processing those transactions, it included the receipt and delivery of the securities, as well as sending out the confirmations, as well as receipt and disbursement of the cash involved in those transactions.

Q Sir, as operations manager, are you familiar with the procedures with the firm Weeden & Company regarding keeping and maintaining records of that firm?

A Yes,sir.

Q Are you familiar with what those procedures were in 1972?

A Yes, sir.

Q Will you tell us what the procedures were, particularly in regard to confirmations?

A In 1972, as it is in 1976, for every transaction that Weeden & Company enters into, we send a confirmation. The confirmations are printed by our computer on the evening that the trade is done. There are three types of confirmations that come off of the computer. The first type would have all the customer information necessary

to mail those confirmations.

Q What would that be?

A Excuse me?

Q What type of information would that be?

A We would have to have the complete customer name and address on our customer file information. Those confirmations would then be separated into one file at the end of the evening. The second type of confirmation would come off where it would have not only a name and address, but any special instruction that the confirmation would have to be hand-delivered or by messenger to our customer.

The third type of confirmation is where we have incomplete instructions about a particular customer so that we do not have a "mail to" address on the confirmation. The first type I mentioned has all the instructions and they would be mailed out. The second type the following morning would be forwarded to a messenger area and hand-delivered to our customers.

The third type which does not have complete instructions would be sent to what we call the special confirmation desk. In that area the person performing that function would have to complete the necessary information to mail that confirmation.

Q How would he be able to complete that type of information? What would he go to to complete the confirmation at the special situation desk?

A If the customer file was not complete, he would have to go to the order ticket to get the rest of the information from the order ticket as to where to mail that confirmation to.

xxx (Government Exhibit 11 was marked for identification.)

Q I show you Exhibit 11 for identification consisting of a number of documents, approximately four. Would you look at those and tell us if you can identify those?

A These are Weeden confirmations which are mailed by Weeden & Company.

Q Have you ever heard of a companycalled Seed Capital Corporation?

A Yes,sir.

Q To your knowledge, has Weeden & Company ever had any business dealings with Seed Capital?

A Yes, sir.

Q Approximately when was that, if you know?

A In October-November, 1972.

Q What was the nature of these dealings?

A Weeden & Company bought from Seed Capital Corporation in four separate transactions a total of 6000 shares of American Home Products.

Q Did Weeden & Company do anything else with regard to this information?

A No, sir.

Q With regard to Seed Capital?

A No.

Q What is involved in the brokerage transaction?

A I am sorry?

Q What is involved in a brokerage transaction? YOu said it bought stock from Seed Capital. What is involved --

MR. POLLACK: Objection. I would ask that the witness be limited to what happened in the transactions with Seed Capital and Weeden & Company which is at issue in his trial.

THE COURT: I think you can ask him to simply describe what the precise nature of this transaction was, Mr. Lutz.

Q Would you describe what happened in this transaction, this specific transaction?

A Okay. There were four separate transactions of which Weeden & Company purchased, as I said, a total of

6000 shares. In each of the transactions Weeden & Company mailed confirmations to Seed Capital Corporation at 61 Broadway, New York, New York. We then received the securities in on settlement date and paid for that transaction or each of the transactions.

Q Paid for the shares delivered in?

A Yes,sir.

Q You have said that this Exhibit 11 for identification represented Weeden confirmations. Were these kept and maintained in the usual, normal course of business?

A Yes, they were.

Q Were they prepared or made at or about the date appearing on the confirmation?

A Yes, sir.

Q What date or dates is that, if you recall?

A October 12, October 13, October 16 and October 26, 1972.

MR. LUTZ: At this point the Government would offer these confirmations in evidence.

MR. POLLACK: Your Honor, may I just voir dire the witness for a moment?

THE COURT: Yes.

VOIR DIRE EXAMINATION BY MR. POLLACK:

Q Mr.Avena, are these documents kept in the

regular course of business?

A Yes, sir.

Q Are you the possessor of these documents?

A Meaning -- possessor, meaning actually keeping confirmations in my possession?

Q Are you the custodian of them?

A Yes,sir.

Q They are kept in your section?

A Yes, sir.

Q You said they are filled out by computer?

A Most of the information appearing on those documents were filled out by computer, yes, sir.

Q On two of these documents,sir, it has handwritten in, "Correction to follow." Did you put that hand-written notation on there?

A No, I did not.

Q Did Weeden & Company put it on there?

A No.

Q On another one it is stamped on, "Correction confirmed." Do you know who put that on there?

A Weeden & Company.

Q You put that on there?

A Yes, sir.

Q What caused you to put that on there?

A In the four transactions we entered into with Seed Capital Corporation, we charge them New York State transfer tax. After the trade we found out that Seed Capital must have called us and said that they paid their own New York State transfer tax. So rather than deduct the sales transfer tax from the total amount of proceeds, we adjusted our confirmation.

MR.POLLACK: I have no objection to these, your Honor.

THE COURT: Mr. Klempner?

MR.KLEMPNER: I have no objection.

THE COURT: They may be received.

xxx (Government Exhibit 11 was received in evidence.)

BY MR. LUTZ:

Q Sir, I believe you testified that these were confirmations that were mailed by Weeden. Do you know to whom they were mailed?

A Seed Capital Corporation, 61 Broadway, New York, New York.

Q They reflected what transactions?

A That Weeden & Company purchased 2500 shares of American Home Products on October 12, that Weeden purchased 1000 shares of American Home Products on October 13, that

Weeden purchased 1000 shares of American Home Products on October 26 and that Weeden and Company purchase 1500 shares American Home Products on October 16.

Q Sir, you also testified, I believe, that these were mailed. Do you know how they were mailed? How do you know that they were mailed?

A This confirmation fell into one of the categories that I mentioned before, and that is that we did not have a complete customer form filled out on Seed Capital Corporation, that the only thing appearing on our computer records was the name of the company, Seed Capital Corporation. Therefore, the confirmations on the morning after trade date were forwarded to our special situations desk where the rest of the information would have to be typed on the confirmation.

At that time our person handling that operation, seeing that on the customer card it didn't have all the complete information, would have to have gone to the order ticket. The order ticket had the address on it. There were no other instructions on the order ticket or the custome form to indicate what to do with the confirmations. So there were no special handling instructions. The clerk at that time would have had to type on the rest of the information, the address, and mailed those confirmations

out.

Q Did you refer to any records to make a determination whether in fact there were any special handling instructions with regard to the transactions with Seed Capital?

A Yes,sir. We have the -- I have the customer -- new customer name and address file which was filled out on October 13, 1972, which only has the customer's name, but does not have the address or any other special instructions on that.

I also have a copy of the order ticket which does have the customer name as well as the address.

So looking at those two documents, the clerk at that time would have typed on the "mail to" address.

Q Would you describe specifically the procedure that would have been followed in the mailing of these confirmations to Seed Capital?

A Yes,sir. On the morning after trade date, the confirmations would have gone to the special situations desk, and the person performing that job would have had the new customer form as well as the order ticket and typed the "mail to" address, stuffed it in an envelope and routed it to our mail room to be mailed.

Q Would there be any situations where confirmations

would be hand-delivered by Weeden?

A Yes,sir.

Q To a customer.

A If the special instructions either on the order ticket or the new customer form would indicate whether we would hand-deliver the confirmations as opposed to mailing, that would have to be put on either the order ticket or the new customer form.

MR. LUTZ: I have no further questions.

THE COURT: Mr.Avena, are you aware of any rule of the New YorkStock Exchange which provides that confirmations must be mailed and cannot be delivered by hand?

THE WITNESS: I am aware of that ruling, your Honor, but Weeden & Company is not a member of the New York Stock Exchange.

THE COURT: Mr. Pollack?

CROSS-EXAMINATION

BY MR. POLLACK:

Q Mr.Avena, do you know James Leonard Brown?

A No,sir.

Q Have you ever had any dealings with him concerni American Home Products?

A No, sir.

Q Concerning Weeden & Company's certificates or confirmations, do you know the date that the order was placed with you to sell stock?

A We have it on the order tickets, yes, sir.

Q What was that date?

A The first transaction was October 12.

Q Seed Capital communicated with Weeden and authorized sale of a certain amount of American Home Products stock?

A Yes,sir.

Q They would authorize it at a certain price?

A Yes,sir.

Q And Weeden could not sell it unless it obtained the price the customer wanted, correct?

A No, sir.

Q Not correct?

A No. Weeden & Company is a marketmaker. When we get a call from a customer, we are able to execute that order right on thephone. We deal in stocks in our own account. We do not take the order down to the floor of the New York Stock Exchange. Our trader, our salesman, makes a decision right at that moment to buy or sell those securities at a given price.

Q In other words, Seed & Company would communicate with Weeden and say, "We have this much to sell and we will

take it for this price"?

A Or "We have this much to sell. What is your price?"

Q Either they will agree on the price there or they will not?

A Yes, sir.

Q If they agree upon it, then the sale is consummated, correct?

A Yes, sir.

Q The price is agreed upon?

A Yes, sir.

Q Was there such communication in this instance?

A Yes,sir.

Q How did such communication occur?

A Seed Capital Corporation must have called Weeden -- did call Weeden & Company, asked for a price on October 12 for 1000 shares -- I am sorry, October 12, 2500 shares. Weeden stated that it would purchase at 114-1/4. Seed Capital Corporation said, "I accept." We wrote an order ticket. Seed Capital Corporation wrote an order ticket.

Q At the end of that conversation, then, Seed Capital Corporation knew that it had sold X amount of shares for X dollars per share, correct?

A Yes, sir.

Q Anything else was just in the recordkeeping process of Weeden & Company and Seed Capital Corporation, is that correct?

A Yes, sir.

Q It is the practice in the securities industry to have a settlement date approximately seven days subsequent to the agreement?

A Five business days, yes, sir.

Q That settlement date is when the stock is delivered by the seller?

A That is the date -- the earliest possible date that it can be delivered. There are occasions when it is delivered after that.

Q But that is agreed upon between the parties?

A Yes, sir.

Q Is it not also a fact thaton the delivery of the stock, a check is written by the buyer to the seller?

A Yes,sir.

Q Is it not a fact that on this occasion that occurred?

A Yes,sir.

Q Did Seed Capital bring the stock to Weeden & Company?

A Yes, sir.

Q In the person of who?

A I don't know.

Q Do you know who brought it?

A I don't know.

Q Was a check issued by Weeden & Company?

A Yes,sir.

Q Was it handed to the person who brought the stock?

A Yes,sir.

Q Is that the normal course of practice in the industry?

A Yes,sir.

Q There is no mailing of that check, is there?

A On occasion we would mail it.

Q In this instance, was there?

A No,sir.

Q Was there a mailing of the stock to you?

A No,sir.

Q Is there any question at all but that on October 12 Seed Capital would have been apprised of all relevant information containedon that confirmation ticket?

A Yes, sir.

Q They had it already, right?

A Yes.

Q This is just to confirm what Seed Capital already knows, correct?

A Well, first of all, you have a situation here where a salesman at Seed Capital Corporation is talking to a salesman at Weeden & Company. My responsibility is operations manager, someone responsible -- if there was -- someone's responsibility at Seed Capital Corporation to make sure that what the two sales people agreed upon were in fact all the details in this particular trade

Q If all communication is accurate, then in fact both parties are aware the day before this is sent of what their arrangement is?

A As operations manager of the firm, approximately 5 per cent of our confirmations are incorrect. So therefore, this confirmation is really the record to make sure that the trade has been agreed upon by the two parties.

Q But 95 per cent are correct?

A Yes,sir.

Q And you are dealing with professionals, is that not correct?

A For the most part, yes, sir.

Q And therefore professionals take great pains to make sure they are correct because they are dealing in

large amounts of money, correct?

A Yes,sir.

Q Sometimes the difference of a percentage point can mean the difference between a profit and loss in a resale?

A Yes, sir.

Q In effect, sir, is it not a fact that when you deal with somebody at Seed Capital, the agreement, if there is one, has been agreed to on the telephone?

A Yes,sir, but in this particular case the sales transfer tax was wrong. So had we not sent out confirmations and received confirmations and adjusted our ticket, at the time that Seed Capital Corporation delivered the stock to Weeden & Company, we would not have paid them the correct amount.

Q But isn't it a fact, sir, that it is an administrative function, whether you paid the tax or they paid the tax?

Q But it would have been part of the purchase price had we not adjusted the ticket. As you could see here,we would have paid them $125 less than what they were looking for.

Q But they would have to pay that $125 themselves to the party who collects the tax?

A Exactly.

Q They are going to lose the money whether they pay it or you pay it?

A Exactly.

Q The gross amount of the money is still 2500 shares at $114.25 per share?

A Right.

Q That does not change?

A Right.

Q That is agreed upon on the 12th telephonically between your salesman and the Seed Capital salesman?

A Yes.

Q Nothing changes that regarding these papers, correct?

A (Nodding negatively.)

THE COURT: There is no answer. What he said was correct?

THE WITNESS: Yes, sir.

MR. POLLACK: Nothing further.

MR. KLEMPNER: No questions.

REDIRECT EXAMINATION

BY MR. LUTZ:

Q At the execution of the trade is the transaction completely consummated or does the transaction become

consummated on delivery of the confirmation and delivery of the stock? When is the transaction complete?

A Upon the receipt and disbursement in this case of cash, receipt of securities and disbursement of cash.

Q That occurs after the confirmations or the correctec confirmations have been mailed, is that correct?

A Yes,sir. We are required by the NASD, as was Seed Capital Corporation, to send out confirmations to confirm all trades done between the two firms.

Q Is that with regard to retail customers?

A No, a dealer to a broker or a broker to a dealer. We are not members of the National Association of Securities Dealers, and we are required to send out confirmations to avoid any problems in consummating a trade between any two firms.

Q So that the confirmations themselves provide a refe nce point, if you will, so that the buying broker knows what stock and how much to deliver and knows how much is going to be paid exactly, the net amount, by the buyer? The seller knows exactly what he is going to receive back for the shares he is selling, is that correct?

A Yes,sir. These are really the only record that each of the firms have, other than the fact that they

entered into the trade or they began the trade with the phone conversation. These are official records of our firm so that if there were any problems prior to payment or receipt, we would be able to go back to these documents to straighten it out, or if there were any questions after the trade was completed, we would be able to go back to our records.

That is primarily how the other brokerage houses work also, that the confirmations become an important part of the processing, and the 5 per cent number of Weeden & Company would be approximately -- could on any given day be 80 to 150 confirmations that are wrong. So it is important to make sure that our confirmations are mailed out or received by the customer and we receive his confirmation also.

Q If a confirmation is wrong because of one reason or another, is a corrected copy also mailed?

A Yes,sir.

Q That determines what will occur on the settlement date?

A Yes,sir.

MR. LUTZ: No further questions.

MR. POLLACK: Just one or two, your Honor, if I may.

RECROSS-EXAMINATION

BY MR. POLLACK:

Q How far is 61 Broadway address of Seed Capital from Weeden?

A About two blocks.

Q Therefore it is no great imposition to walk the stocks over and take the money back, is that correct?

A Yes.

Q ARe messenger services used frequently in the stock center?

A Yes, sir.

Q They are used in place of the mails to route things around?

A Well, primarily to move securities.

Q Andmove them quickly?

A To move securities.

Q As quickly as possible, correct?

A Yes,sir.

Q You said on occasion confirmations would be sent by messenger rather than mailed?

A Yes, sir.

Q Sir, do you know for a fact within your own knowledge that these particular certificates were in fact mailed?

A Based on the procedures that Weeden & Company had in 1972 --

Q No, not by procedures.. Do you of your own knowledge know that these were mailed?

A The fact that these confirmations that I have in front of me have an incomplete address on it, the fact that the customer file sheet did not have an address on it, that these confirmations were definitely routed to our special confirmation desk and the address was typed on it, there are no other special instructions.

We would have used a stamp that said "hand-deliver" or the computer would have printed on the special instruction form here "hand-deliver." That did not appear anywhere on the confirmations. Therefore, based upon our procedures, I would have to say yes, that the confirmations were mailed.

Q You personally know this, that they were mailed?

MR. LUTZ: Your Honor, he explained how he does know it.

MR. POLLACK: Your Honor, I think that the answer, while it is very informative, is not responsive.

THE COURT: I think it is responsive in that he was explaining the reasons for what he regards as his

knowledge.

If you want to pursue the question of whether he actually saw them physically dropped in a mail box, that is about the only other way we can go.

Q Let me ask you this, Mr. Avena. When the address was put on there, did that require a call to Seed Capital to get the information?

A No, sir.

Q Where is that information obtained?

A It is on the order ticket.

Q Seed Capital communicated --

A At the time of trade.

Q Did Seed Capital know a confirmation slip was being written up?

MR. LUTZ: Objection. Seed Capital --

THE COURT: Sustained.

Q Within the industry, would a selling house know from practice and custom that a confirmation was being prepared?

A Based on the NASD rules, you have to prepare a confirmation.

Q Has it ever occurred that the selling house would pick up a confirmation ticket?

MR. LUTZ: He is asking again for a guess

of the witness, your Honor.

THE COURT: No, this is industry practice.

A On occasion,yes.

MR. POLLACK: No further questions.

THE COURT: Mr.Avena, you told the jury a moment ago that under the rules of the National Association of Securities Dealers it was required that a written confirmation be sent, is that correct?

THE WITNESS: Yes, sir.

THE COURT: Yet I understood you to say a little bit earlier that in special situations or in response to special instructions confirmations could go by hand.

I have trouble seeing both of these things.

THE WITNESS: According to the NASD, your Honor, you have to give the other party a confirmation. It doesn't necessarily -- it doesn't state that you have to mail them. You are prepared to send a confirmation to the other broker and he one to you.

THE COURT: But what is required by the rules is that a confirmation be given, but the rules do not require that it be mailed?

THE WITNESS: No; that is correct.

THE COURT: Anything further, gentlemen?

RE-REDIRECT EXAMINATION

BY MR. LUTZ:

Q At Weeden & Company, under what circumstances would a customer pick up a confirmation or have it not be used -- not sent in the mail?

A I really -- the only direct knowledge I have of that is if a customer called myself up and said, "We are having a problem, we need the confirmation by settlement date," and we give our bank instructions to get the money there and we make sure that it was at the window.

Q Would there then be delivery instructions in lieu of an address on there?

A They would have written on the confirmation, "Will pick up." The special instructions, we never say "Will pick up confirmation." That is a rare example or a rare occasion for something like that to happen.

They would have to put on there "Pick up confirmations at window," because we are processing approximately 1500 confirmations a day . The procedures are pretty well adhered to, the first type coming right off the computer being mailed to the customer, the second type being hand-delivered would have to be so signified on the confirmation, when to a messenger, in turn passed over to our messengers to hand-deliver, and the third type

going to our special situation desk where they would type on the rest of the information.

Unless they put a "will pick up" or a stamp saying that we will hand-deliver, these confirmations are stuffed in an envelope and mailed out.

Q Were there any such instructions on any of the confirmations sent to Seed?

A No, sir.

MR. LUTZ: No further questions.

THE COURT: Anything further, gentlemen?

MR. POLLACK: No, your Honor.

THE COURT: You are excused, Mr.Avena. Thank you for your assistance.

(Witness excused.)

MR. LUTZ: The next witness is Mr.Ralph Montuori.

(continued on next page.)

End 1 PM

PM T2

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RALPH MONTUORI, called as a witness by the Government, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LUTZ:

Q Mr. Montuori, how are you presently employed?

A I am office manager for Loeb, Rhoades & Company.

Q What is the address of Loeb, Rhoades?

A 42 Wall Street, New York, New York.

Q In what type of business does Loeb, Rhoades engage?

A Stock brokerage business.

Q Was that also true during 1972?

A Yes.

Q Were you office manager in 1972?

A I was not.

Q What was your position then?

A I was the Mail Department manager in 1972.

Q What were your duties as Mail Department manager?

A I oversaw all outgoing mail operations for the firm, specifically handling of confirmation statements, research material, and other items pertaining to the brokerage business.

Q Have you ever heard of a company called Ferkauf,

Roggen, Inc.?

A Yes, sir.

Q If you know, has Loeb, Rhoades ever had any business dealings with them?

A Yes.

Q What was the nature of those dealings?

A We handled the clearing operations for Ferkauf, Roggen, Inc.

Q Was that true in 1973?

A Yes.

Q Would you tell us, please, what you mean by "clearing operations"?

A Clearing operations is basically the back office procedures handled by one firm for another brokerage firm, specifically mailing of confirmations, mailing month end statements, handling certain transactions.

Q Have you ever heard of a company called Seed Capital?

A Yes, sir.

Q If you know, has Loeb, Rhoades & Company ever had any business dealings with Seed Capital?

A Yes.

Q Would you tell us what those dealings were?

A In the latter part of October 1972 a confirmation

was sent to Seed Capital Corporation.

Q Do you know what that was for?

A For 500 shares American Home Products.

Q The transaction, was it between Loeb, Rhoades and Seed Capital or between someone else and Seed Capital?

A It was between Ferkauf, Roggen and Seed Capital. Loeb, Rhoades just handled the clearing operations.

xxx (Government Exhibit 12 was marked for identification.)

Q I hand you Exhibit 12 for identification and ask if you can identify it.

A That is a Loeb, Rhoades confirmation mailed to Seed Capital Corp.

Q Is this confirmation kept in the normal course of business?

A Yes, sir.

Q Is it prepared on or about thedates hereon?

A On or aboutthe dates thereon, yes, sir.

Q You hav e seen this before, have you not?

A Yes, I have.

Q Do you know which date it is prepared on?

A It would be prepared on -- the date of the trade date was the 27th, and it would be prepared on the 28th of October 1972, the day following the transaction.

Q Can you describe to us the procedure by which this would be prepared?

A The day following any transaction, confirmations are printed up in our computer room approximately three o'clock in the morning, sent down to our Mail Department for distribution thereof.

Q What happens when it gets down to the mail room?

A In that specific case it would be mailed to the designated person or company.

MR. LUTZ: At this time the Government would offer Exhibit 12 in evidence.

THE COURT: Received.

xxx (Government Exhibit 12 for identification was received in evidence.)

Q I show you this exhibit, Mr. Montuori. There is some writing on that in a ball point pen, apparently. To your knowledge, did Loeb, Rhoades write any of that on there?

A To my knowledge, no.

Q How, if you know, would that confirmation come off a computer?

A Exactly as you see, except for the writing and scratch marks that are made on the confirmation.

Q After it came off the computer, what time would

that be?

A Roughly between three and four o'clock in the morning. Then it would be sent down to our Mail Department.

Q At approximately what time would that be?

A Roughly between four and five in the morning.

Q Then what would happen?

A This and many other confirmations would be bursted down, separated from the rest of the confirmations, it would be checked through by hand, looking for any special instructions on the confirmation, and in this case it would have been mailed out.

Q Were there any special instructions on this confirmation?

A No, there were not.

Q What does this confirmation reflect specifically? What information?

A The selling of 500 shares of American Home Products Corporation for $114.58.

Q Who was the selling broker?

A The broker that the transaction went through was Ferkauf, Roggen.

Q Were they the buying broker or the selling broker?

A They were the buying broker. Seed Capital was selling the 500 shares.

Q Under what circumstances, if any, would a confirmation be sent other than by the mail by Loeb, Rhoades?

A The only way a confirmation would be sent other than by the mails is there would be special instructions printed on the face of the confirmation telling us specifically how to send the confirmation out, whether by messenger or by courier.

The information must also appear on the new account card.

Q Did you check the new account card in this case?

A Yes, I did, personally. There was no special instructions on the new account card.

Q Then I ask you again, was this confirmation mailed?

A Yes, sir.

MR. LUTZ: No further questions.

CROSS EXAMINATION

BY MR. POLLACK:

Q Sir, do you know James Leonard Brown, sitting there in the blue suit?

A No.

Q Have you ever dealt with him?

A No.

Q Have you ever sold stock to him through Loeb,

Rhoades & Company?

A No.

Q In this Government Exhibit 12, the buying company was Ferkauf, Roggen?

A That's my understanding, yes, sir. Seed Capital was selling it through Ferkauf, Roggen.

Q Through Ferkauf, Roggen?

A Yes, sir.

Q Did Loeb, Rhoades buy this stock?

A I don't know. All I know is that the firm of Loeb, Rhoades cleared the transaction. In other words, it did all the paper work pertaining to the transaction.

Q Who bought the stock from Seed Capital? What does this indicate?

A I am not too sure who is on the other side. In fact, I am not too sure who is on the other side buying.

Q This gives you no indication of who bought it? It doesn't tell us who bought it?

A No.

Q Ferkauf, Roggen doesn't have their own ability to handle their own paperwork? Is that why Loeb, Rhoades is involved?

A Right. Some of the smaller companies clear through Loeb, Rhoades. In fact, we handle all the back

office procedures for them.

Q When a settlement was made, who issued the check for the stock in this transaction?

A I couldn't answer.

Q Who was the stock delivered to?

A Loeb, Rhoades & Company.

Q Then how were they paid?

A I can't say, sir.

Q Did Loeb, Rhoades have the responsibility for paying Ferkauf?

A I would assume, on the commission part, yes, for clearing this part of the transaction. In other words, Seed Capital Corp. was the client of Ferkauf, Roggen.

Q So in effect Ferkauf, Roggen was selling the stock, correct?

MR. LUTZ: I think he already answered that by the confirmation.

A According to the way the confirmation reads, it doesn't say Ferkauf, Roggen was selling. It says Seed Capital.

Q Through Ferkauf.

A Right; through Loeb, Rhoades, who cleared the confirmation.

Q In other words, because Ferkauf had a relationship

with Loeb, Rhoades, Seed was selling through them and they were selling to a third party and Loeb, Rhoades cleared it back? I don't mean to sound confused, but I am.

A (No response)

Q We know Loeb, Rhoades, they cleared the transaction.

A Right.

Q They did nothing but do the paperwork. You get a stated amount for that, right?

A Right. There is a fee.

Q We know Seed Capital sold the stock.

A Right.

Q They got the proceeds of the sale. My understanding is that a fee was deducted, is that right?

A Right.

Q Ferkauf, Roggen did what?

A Seed Capital was Ferkauf's client.

Q So, did Ferkauf buy the stock?

A Not that I am aware of, no.

Q Did Seed Capital sell it to a third party through Ferkauf?

A I don't know who the buying party was.

Q What does the confirmation indicate?

A The confirmation indicates that Seed Capital

Corporation sold 500 shares of American Home Products Corp.

Q To whom?

A I don't know who the buying party was.

Q It was my understanding of the testimony prior of persons in your like situation that the confirmation was aimed at setting forth the entire transaction so that all parties knew what they had agreed to.

A All I could tell you is what I see in front of me. It doesn't tell you who the buying party was.

Q Is it not a fact, sir, that when a sale is consummated, the seller, the selling party, receives word from the person authorized to sell it that he made the deal?

A Would you repeat that again, please?

Q Seed Capital, by example, authorizes you to sell their stock, all right? You told it to me at the stated price. You would then contact Seed Capital and tell them you sold the stock, right?

A Yes.

Q You telephone them right away? That's the procedure on the Exchange?

A Telephoning, and the confirmation.

Q Butthere is an immediate communication?

A In some cases, yes. Sometimes it is done over the teletype system.

Q But, in any event, some communication takes place prior to a confirmation.

A Right. That's how the transaction is evolved to begin with.

Q The confirmation is a lapse of time. You testified that these are prepared five o'clock in the morning.

A Between three and four in the morning.

Q The next morning.

A Always the next morning after a transaction.

Q Assuming Uncle Sam's mail gets there a day later, correct? You get it two days after a transaction?

A Right.

Q The transaction --

MR. LUTZ: I don't think he can testify to exactly when the confirmation was received.

THE COURT: He is experienced in the Mail Department. I think we can take his evidence on this question.

Q The only way to get the information there faster is by either messenger or telephonic communication, is that correct?

A Correct.

Q All of these systems which have been set up in the financial district are nothing more than safety checks

to make sure that the parties understand what they have agreed to.

A It is information in documentation form informing the client as to the terms and conditions of the sale.

Q Does the buyer from this certificate, Government Exhibit 12, know what he has bought?

A The buyer?

Q Yes.

A No. It is only the seller on this certificate.

Q Who is the buyer?

A I don't know who the buyer is.

Q So this does not represent a full and plenary setting down formally of the conditions of sale?

A It tells the client, in this case Seed Capital Corp., the number of shares he has sold, the price that he is to pay or receive, the taxes that are being taken out, the commission involved, the state tax that is to be taken out, and any service charges there are.

Q Let me ask you this. On the state tax, that's a set formula, isn't it?

A I couldn't answer that. I am not fully aware of that situation.

Q On the commission, isn't that a set formula on th[illegible]xchange, or wasn't it in '72?

A In '72 I believe it was. Now it is not.

Q At that time anybody dealing in securities would know that a commission was based upon what he was selling it for, is that correct?

A Correct.

Q The SEC fee, $1.15, is that a set fee?

A I don't know.

Q The amount is nothing more than a multiplication of the amount of shares sold times the price per share?

A Right.

Q So anybody selling would be able to figure that out without this confirmation, correct?

MR. LUTZ: Your Honor, anyone selling could be anybody here in the courtroom. They may not be able to figure out that type of information.

THE COURT: Mr. Pollack is asking the witness whether by simple mathematics, to wit, multiplication, the purchase price could be arrived at.

It is self evident, it seems to me.

MR. LUTZ: Two brokers may come up with different calculations because they looked at different tables or made a mistake, or whathaveyou.

THE COURT: Let's see what the witness says. He is in business. I am not.

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lhjg 14 Montuori - cross

Q If you multiply 500, the number of shares, by 114 5/8, wouldyou come up with $58,312.50?

A Correct.

Q Anybody who did it accurately would come up with that, correct?

A Correct. But -- may I continue?

Q Let me just continue, if I may, asking you questions. It will be easier.

You say there are occasions when these can be delivered?

A If the special instructions appear on the confirmation and the new account form.

Q How far is the Loeb, Rhoades office from the Seed Capital office?

A I'd say a block or two away. It's right around the corner.

Q Could this also be picked up?

A No.

Q The seller cannot call and, when he calls, say, "I will pick it up tomorrow, to save a day?

A No.

Q Never happened?

A No.

Q Does Ferkauf get a copy of this?

A A duplicate copy, yes.

Q That is also mailed?

A Yes.

Q Does this indicate what Ferkauf's commission would be?

A No, it doesn't.

Q Would their copy indicate what their commission is?

A They have a special commission structure they work over the end of the month and their commission is figured out on a monthly basis.

Q Their commission is between they and Seed Capital

A They and Seed Capital and they and whoever else their retail clients might be.

Q It has nothing to do with Loeb, Rhoades?

A Loeb, Rhoades figures out their commission, yes.

Q For FErkauf?

A Yes.

MR. POLLACK: No further questions.

THE COURT: Mr. Klempner?

MR. KLEMPNER: I have no questions.

MR. LUTZ: A couple of questions to clarify a few things.

REDIRECT EXAMINATION

BY MR. LUTZ:

Q You said you didn't know who the buyer of the American Home Products stock was. Does that mean that Ferkauf didn't buy that stock for one of its own customers or that Ferkauf wasn't the buyer, or you don't know?

A I am not sure.

Q Would you ever mail a confirmation for purchase or sale for Ferkauf, Roggen unless they had a transaction that had to be cleared through you?

A Repeat that again.

Q Exhibit 12 has two names on it. What are the two names?

A Loeb, Rhoades & Company, Ferkauf,Roggen.

Q Does Loeb, Rhoades & Company have any other types of confirmations other than one like Exhibit 12 with the name Ferkauf and Loeb, Rhoades on it?

A They have Loeb, Rhoades confirmations with Loeb,Rhoades only and Loeb, Rhoades confirmations with other clearing brokers.

Q To your knowledge, unless Loeb, Rhoades was clearing a transaction, mailing a confirmation for a purchase or sale for one of the purchasers for whom it was clearing, such as Ferkauf & Company, would it mail a

confirmation of the type of Exhibit 12?

A Yes.

Q What are the circumstances under which Loeb, Rhoades would mail a confirmation with its name and Ferkauf's name on it when it wasn't confirming a transaction, either as purchaser or seller?

A I am sorry, I got that wrong.

Q Would there be a confirmation of the type of exhibit 12 in any situation other than where there was either a purchase of stock or a sale of stock by Ferkauf, Roggen?

A Not that I am aware of, no.

Q This confirmation, Exhibit 12, says "You sold 500 shares. Addressee of Seed Capital, omnibus account, 61 Broadway." Who is Seed Capital?

A Who are they?

Q As far as this confirmation is concerned?

A A retail client of Ferkauf, Roggen.

Q Are they a buyer or seller of this stock?

A They are selling this 500 shares.

Q And Loeb, Rhoades, we have established, is handling the clearing operations?

A Correct.

Q For whom?

A For FErkauf, Roggen.

Q Did Ferkoff, Roggen then engage in a transaction with Seed Capital insofar as this confirmation is concerned?

A Yes. It is FErkauf, Roggen's client.

Q What you are saying is that Ferkauf, Roggen bought the 500 shares, but you don't know whether it bought it for itself or for some other customer, is that what you are saying?

A Correct.

Q You don't know who FErkauf, Roggen's customer is, is that what you are saying?

A Yes.

Q That is what you are saying, that is what you mean when you say you don't know who the buyer was?

A Correct.

Q You don't know who Ferkauf, Roggen's customer is?

A Yes.

MR. LUTZ: No further questions.

THE COURT: Mr.Montuori, you said in answering one of Mr. Pollack's questions that the confirmation slip that we have been talking about could not have been picked up manually by Seed, is that correct?

THE WITNESS: Correct.

THE WITNESS: Because there are no special instructions stating that on the face of the confirmation.

THE COURT: Had there been such special instructions, would it have been possible to have a by hand picking up of the slip?

THE WITNESS: Yes, but the special instructions must appear on the new account card when the account is opened up and it must also appear on the face of the confirmation.

THE COURT: In the absence of such special instructions or notations, your practice was to mail them out?

THE WITNESS: Mail them out.

THE COURT: That is all I have.

Anything further?

MR. KLEMPNER: No, your Honor.

MR. POLLACK: No.

THE COURT: Thank you, sir, you are discharged with the cha ks of the Court.

(Witness excused.)

MR. LUTZ: The next witness, your Honor, is Chester Gray.

* * *

Q Who if anyone else was present?

A A Mr. Horwitz, Fred Horwitz.

Q Was there any discussion?

A There was a discussion about stolen stock certificates.

Q Who said what to whom?

A Well, Mr. Brown said to me if I can dispose of some stolen stock certificates --

Q I can't hear you.

A Yes. Mr.Brown asked me if I could dispose of a large block of stock, one being of 10,000 shares of blue chip stock.

Q Did you say anything to him at that time?

A I told him that I couldn't dispose of a block of stock that large in that denomination.

Q What type of stock is this again?

A It was McDonald's.

Q Did you say stolen? I didn't hear.

A It was going to be stolen.

Q Did you have any other meetings with Mr.Brown after this?

A Yes. At the end of that week Mr.Brown picked me up at my hotel in New York and I went over to his apartment up in Queens.

Q You have to speak up.

A I went to his apartment in Queens a few days after that.

Q Who was present, if anyone else?

A At that meeting Mr.Brown introduced me to a man, Mr. Krappman, and a Mr. Artie.

Q Will you look around the courtroom and tell us if you see Artie here today?

A Yes, I do.

Q Would you point him out, please?

A The gentleman in the checkered jacket.

MR. LUTZ: Let the record reflect that Mr.Gray has identified the defendant Arthur Daly.

Q Was there any discussion at this meeting in Brown's apartment?

A Yes.

Q Tell us what was said.

A Mr.Brown introduced me to Artie and Mr. Krappman and Mr.Brown told me that Mr. Krappman was the one that had the availability of stock certificates from the transfer agent. We discussed about the removing the stock certificates from the transfer agent.

Q Who had the availability to that transfer agent?

A Mr.Krappman had the availability at the bank

that he worked.

Q Do you know what bank that was?

A I think it was Manufacturers Hanover.

Q Did you have any other meetings after this meeting with regard to this?

A Yes. I had a meeting with Mr. Brown and Mr. Horwitz shortly thereafter, as Mr.Brown took me back to the hotel. We discussed about the counterfeiting of stock certificates through Mr. Horwitz, who was acquainted with Mr.Brown, had a printing company, and we made a decision -- we decided to see Mr. Horwitz the following week and discuss with him if he could counterfeit these securities.

Q Which securities are you talking about?

A American Home Products.

Q Did Mr. Horwitz say anything when you had that discussion with him?

A Mr. Horwitz said he could counterfeit securities if he had a copy of one to see and make a study of it, and if we would be able to get him a copy, he would be able to tell us.

Q Did you have any other meetings after this one?

A After that I had a meeting with Mr. Brown and Mr. Krappman, and we asked Mr. Krappman if he could get us

* * *

lhjg 8 Gray - direct

receive?

A Well, my group, which was the selling group, was going to receive fifty per cent of the proceeds and Mr. Brown's group, which was the group that was counterfeiting and supplying the certificates, was going to receive fifty per cent.

Q When was that discussion and between whom?

A That discussion was with Mr. Brown and a friend of his, Eddie, whom I had lunch with at the same restaurant on 52nd Street and Madison one afternoon. I don't remember the date.

MR. LUTZ: No further questions.

THE COURT: Before we begin cross examination, we will take a brief adjournment of about five minutes.

(Recess)

* * *

MR. POLLACK: I think that is too far.

MR. LUTZ: That is what we want to make clear.

MR. POLLACK: Unless the Court identifies it as MR. Gray's statement, the jury is to understand that it is merely a document used to refresh Mr.Gray's statement, and is not his statement.

THE COURT: And is not his statement.

MR. LUTZ: He is right. He threw that in at the end.

THE COURT: I think that that is a proper way to handle it. I think that the concerns on both sides are genuine, and it had occurred to me that a precautionary statement from the Court to the jury might very well solve it.

It seems to me as a practical matter, it will, so I will have a shot at it.

MR. POLLACK: I ask that the statement be made out of Mr.Gray's presence.

THE COURT: Absolutely.

MR. POLLACK: We have just contacted the Waldorf, Drake and Summit Hotels, and we have been informed that what Mr.Gray said this morning is not true. I may need a recess to get somebody up there with a subpoena. He did not -- he has not been at the Summit Hotel for at least two

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(In open court, jury present.)

MR. LUTZ: The next witness i John Krappman.

J O H N K R A P P M A N, called as a witness by the Government, beinq first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LUTZ:

Q Mr. Krappman, in connection with this case, do you have an aqreement with the Government?

A Yes, I do.

Q Will you briefly tell us what that is?

A I pleaded quilty to a securities fraud count, aqreed to testify truthfully to the best of my recollection, and in turn the Government would make known my cooperation to the Judge.

xxx

(Government Exhibit 13 was marked for identification.)

Q . Mr. Krappman, I show you Exhibit 13 for identification and ask if you can identify that?

A That is my aqreement with the Government.

MR. LUTZ: At this time the Government would offer this in evidence.

MR. POLLACK: Relevance, your Honor, lacinq.

THE COURT: I will overrule the objection.

Proceed, Mr. Lutz.

xxx (Government Exhibit 13 was received in evidence.)

MR. LUTZ: At this time the Government would ask permission to read this to the jury.

THE COURT: Proceed.

(Government Exhibit 13 in evidence was read to the jury.)

THE COURT: Ladies and gentlemen of the jury, I have admitted this agreement between the Government and Mr. Krappman into evidence and permitted its text to be read to you because I have ruled that it is appropriate that you have full knowledge of the agreement between Mr. Krappman and the Government and the circumstances pursuant to which he is testifying on this trial before you and before me.

However, I want to stress one thing to you particularly, and that is that, as I have said to you before and will say to you again, you jurors are the sole judges of the truthfulness of this witness or any other witness. Matters of credibility, by which I mean, of course, whether or not the witness is telling the truth, are entirely for you to decide, and accordingly the fact that in this

* * *

lhb-5 Krappman-direct

bath with Arthur Daly.

Q Would you look around the courtroom and tell us if you see Mr. Daly or the person you shared the kitchen with here in court today?

MR. KLEMPNER: Judge, I will stipulate that this is Mr. Daly the witness refers to.

THE COURT: Very well.

Q Mr. Krappman, did Mr.Daly and you ever -- strike that.

Did Daly ever tell you for whom he worked?

A He said he was a truck driver and he worked for Jimmy Brown.

Q Would you look around the courtroom and tell us if you see Mr. Brown here today?

A That's him in the sport jacket, on the end.

MR. LUTZ: Let the record reflect that the witness, Mr. Krappman, has pointed to Mr.Brown and identified him.

Q While you shared a kitchen with Mr. Daly in 1972, did you have any business dealings with him?

A Mr. Daly asked if I could pull some stock certificates from the transfer department. I said I could. He said that he knew some people and that those people would be in touch.

Q Did you have any further discussions about what certificates those were?

A Mr. Daly and I sat down, we had a newspaper. I suggested American Home Products because it was going for approximately -- selling for approximately $120 a share.

Q Can you keep your voice up? After that did you have any other discussions or meetings with anybody about stock certificates?

A Mr. Daly said that we are going to --we made a phone call, we made it at a Texaco station. We didn't have a phone in our apartment. He said he is calling Chester Gray.

When Mr.Daly handed me the phone, the man on the other end said he was Chester Gray. He suggested that we have a meeting.

Q Was there a meeting?

A Yes, sir, there was.

Q Where was that?

A In Jimmy Brown's apartment in Queens.

Q Approximately when was this?

A Around April of 1972.

Q Who was present at this meeting?

A Jimmy Brown, Chester Gray, Arthur Daly and myself.

Q In words or substance, what was discussed? What

* * *

Mr. Brown and Mr. Gray and Mr.Daly, if you recall, with regard to the same subject?

A Mr.Gray called me and we met at Keats. This was in, -- I don't know exactly, around the end of July or the first part of August.

Q What was discussed here?

A He had another sample of counterfeit certificates, and he asked --

MR. KLEMPNER: Can we know who was present?

Q Who if anyone else was present?

A Chester Gray and myself are the only two who are present.

Q This is at Keats?

A Yes, it is.

Q Approximately when is this?

A In August, I believe the latter part of August, maybe the first part of September 1972. I don't recall the exact date.

Q At this meeting between yourself and Mr. Gray, what happened?

A Mr.Gray showed me what he said were counterfeit certificates, and he asked if I thought that they could go through stock transfer department.

Q What did you say?

A They were still not good enough.

Q Was there any other discussion?

A Not at this meeting.

Q Did you have any other meetings with Mr. Gray or with Mr. Brown or Mr. Daly after this meeting?

A Mr. Gray called me on the phone and asked to meet me at Keats. He said that he was going away for a while and he wanted the deal to stop.

Q Was anyone else present besides you and Mr. Gray?

A No, there was not.

Q Do you recall the date of this?

A It was around the middle of September.

Q Did you ever have any more meetings with Mr. Gray after that meeting you just described?

A No, I did not.

Q Did you ever have any more meetings with regard to American Home Products stock certificates after this?

A Yes, I did. A couple of days later Jimmy Brown came over to the apartment on 63rd Street. He said that he was in touch with all the people and that we didn't need Chester Gray, and the deal should go through as planned.

Q Who was present?

A Arthur Daly, Jimmy Brown and myself.

Q Was there anything else discussed that you recall?

A Not that I recall. He said that they were going to -- he would have another viewing of counterfeit certificates shortly, and he would let me know.

Q Was there another viewing?

A Yes. A little later on, about the first of October.

Q Where was that?

A In the apartment at Brooklyn , 63rd Street.

Q You will have to speak up.

A In the apartment in Brooklyn.

Q Who was present?

A Mr. Brown and Mr.Daly and myself.

Q Will you tell us what happened?

A Mr. Brown brought over some what he said were counterfeit certificates, and he asked if I thought they would go through stock transfer. I said yes, I thought they could. He said that he would let me know when they went through and asked if I would be willing to pull them after they had been canceled. I said yes, I would.

Q Was there any other discussion at that time?

A Not at that time.

Q Then what happened next, if anything?

* * *

A No, I did not.

MR. LUTZ: No further questions.

THE COURT: Mr. Krappman, you described a number of meetings at your 63rd Street apartment in Brooklyn where Mr. Brown was also present and Mr.Daly was also present, is that right?

THE WITNESS: Yes.

THE COURT: You described that apartment as consisting of your own bedroom, but that you shared a kitchen and a bath with Mr.Daly, is that correct?

THE WITNESS: Yes, your Honor.

THE COURT: Did Mr.Daly have his own bedroom?

THE WITNESS: Yes, he did, your Honor.

THE COURT: These meetings that you described, in which bedroom did they take place?

THE WITNESS: Most of the meetings were in the kitchen, your Honor.

THE COURT: In the kitchen?

THE WITNESS: Yes.

THE COURT: All right, Mr. Pollack.

MR. POLLACK: Your Honor, may I have a short recess?

THE COURT: Certainly.

MR. POLLACK: I asked for a short recess to go

* * * (pp. 120a-181a)

CHARGE OF THE COURT

Judge Charles S. Haight Jr.,

THE COURT: Ladies and gentlemen, it is my duty now to charge you on the law. We have been here for quite a while. When were you sworn in as jurors on this panel, I was trying to remember. Was it Thursday of last week? Then it is a full week today. It was Wednesday, longer than I thought. I know you were waiting for a while in the panel room. Whichever it was, you are the best judge of that. But it has been a long time, whether it was Wednesday or Thursday, and you were here a few days before coming to be sworn in this court. It is a long time to be away from your job and from your homes. It is not an easy thing to be a conscientious juror in a difficult and important case, and it has come to my attention that during the course of the trial two of you I think have suffered losses in your own families, and that doesn't make it any easier.

It is not an easy thing to do well and conscientiously But it is a number of other things. It is, for example, an act of citizenship, because without your participation in this sort of procedure, the administration of justice simply wouldn't work. It is a manner of being involved, it is a way of bearing witness, it is an act of public

service of a high order.

I am grateful to you and I know that counsel and the parties are grateful to you.

What I propose to do this morning is to instruct you generally on the functions of the Court and the jury and to instruct you specifically on the law that applies to this particular case.

I wish I could just stand here and talk to you about it the way I have been, but it is a matter of some complexity, and my own abilities and wisdom simply don't permit me to do that.

So I am going to have to ask your indulgence because some of it I am going to have to read to you so that I will be sure that I don't leave anything out and state it as accurately as I know how to do. That seems a little impersonal, perhaps, but I am afraid it is the best way to proceed.

Briefly, as you have been told, the defendants on trial, Mr. Brown and Mr. Daly, have been charged by the Government with criminal offenses. It is your recollection of the facts that counts here and not the recollection of counsel and not my recollection. It is for you to determine the weight that will be given to the evidence, the credibility that you will extend

to the witnesses who testified and the reasonable inferences that are to be drawn from the evidence that has been received.

You have heard the summations of counsel. If your recollection differs from that of counsel or from my recollection, if I should refer to any evidence, your recollection and the judgment of the facts that you make controls.

You must approach your duty with an attitude of complete fairness and impartiality, one in which you reach your decision solely on the evidence on the trial and without the slightest trace of sympathy, prejudice or bias for or against either defendant or the Government.

The fact that the Government is a party here entitles it to no greater or no less consideration than that accorded to any party in a court of the United States. All parties are equal at this Bar of justice. It is my province to instruct you as to legal principles that are to be followed in the case, and it is your duty to accept those instructions as they are given to you by me.

On the other hand, it is your exclusive function to determine the facts on the basis of your consideration of the evidence and then, applying the instructions as to

law that I am about to give to you, to decide whether or not either defendant on trial before you is guilty of the charges against that defendant or not guilty. You are the sole and exclusive judges of the facts.

Your decision as to the facts is final and conclusive. In connection with the facts, I want to emphasize that it is your recollection and your understanding of the evidence and only your recollection and only your understanding of the evidence that can serve as the basis for your deliberations and conclusions.

During the trial I have been called upon to make rulings on various questions, such as when a question put to a witness was objected to, or after a question was put and was answered a motion was made to strike out the answer. I have sustained some objections and I have overruled others. I have struck out answers and exhibits that were offered. It is essential in the performance of your duty that when anything was ordered stricken from the record, you put it out of your mind and disregard it.

Similarly, if a question was asked and an objection to that question was sustained and no answer was given, the question itself should play no part in your consideration of the case. No inferences as to guilt or innocence of any defendant on trial or as to the credibility

of any witness should be drawn from any rulings that I have made or from the fact that upon occasion I have asked questions of certain witnesses.

My questions were intended only for clarification, toexpedite matters. They were not intended to suggest any opinions as to guilt or innocence of either defendant or as to the credibility of anyone who appeared before you.

It is neither my intention nor my function to favor one side or the other or to imply that I have any views as to the credibility of any of the witnesses or as to the guilt or innocence of either of the defendants. That is your sole and exclusive function.

Counsel, you must remember, not only have the right but indeed it is their duty to thoroughly investigate their case and interview prospective witnesses and to press whatever legal objections they believe should be asserted and to seek to bar evidence or proposed evidence on legal grounds where that is appropriate.

In doing so, each lawyer is simply performing his sworn duty as a lawyer for a client and on behalf of his client; and that is equally true for Mr. Lutz for the United States and Mr. Pollack for Mr. Brown and Mr. Klempner for Mr. Daly.

As I have indicated earlier, the indictment here

is but a formal method of accusing a defendant of a crime and bringing the case into court for trial and determination. It is not any evidence that a crime has been committed, and no inference of any kind may be drawn from the fact of the indictment.

The grand jury which returned the indictment was not asked to find out if the defendant was guilty or not guilty. That is solely your function. There is one indictment in this case. The indictment names seven defendants in all. Five defendants, Mr. Benigno, Mr. Caponegro, Mr. Axelrod, Mr. Krappman and Mr. Smith, have pleaded guilty. Accordingly, there are only two defendants before you now, James Brown and Arthur Daly. No inference may be drawn against any defendant on trial because others named in the indictment pleaded guilty. The fact that certain individuals named in the indictment pleaded guilty is no evidence against the defendants on trial and may not be considered in any way in determining the facts as to those who are before you.

Mr. Brown and Mr. Daly are the only persons as to whom you are called upon to render a verdict of guilty or not guilty.

In considering that question, you may have to determine the nature of the participation, if any, of

other individuals, but the guilt or innocence of Mr. Brown and Mr. Daly depends entirely upon the evidence produced at this trial, and the fact that certain individuals pleaded guilty furnishes no evidence whatsoever on the question of their guilt or innocence.

The indictment contains nine counts against all defendants, including Mr. Brown and Mr. Daly. It also includes a tax violation count against Mr. Axelrod and a similar count against Mr. Benigno, but those counts are not before you and you need not consider them.

Each count of the indictment with which you are concerned charges a separate crime against each defendant. Each offense and the evidence applicable thereto should be separate from the other counts and within that count the evidence should be considered separately as to each of the named defendants.

The fact that you may find one of the accused guilty or not guilty on any particular count should not influence your verdict with respect to the other defendant or with respect to any other count. Each defendant before you has pleaded not guilty. That means that the Government has the burden of proving guilt beyond a reasonable doubt with respect to each crime that each defendant is accused of having committed. That burden

never shifts. A defendant is under no obligation to undertake to prove his innocence. Indeed, a defendant does not have to submit any evidence or call any witness whatsoever.

On the contrary, under our law a defendant is presumed to be innocent of any charge laid against him in the indictment. That presumption existed when the indictment was handed down, and the fact that a defendant did not take the stand under the law creates no inferences against him.

A defendant's presumption of innocence remains throughout the trial and through your deliberations. It is a presumption which is sufficient in itself to require an acquittal of a defendant, unless you, the jury, on all the evidence, are convinced of his guilt beyond a reasonable doubt.

I say again that under our law the defendant has a constitutional right to remain silent, and no inference unfavorable to the defendant can be drawn from that fact. Your deliberations accordingly must exclude consideration of or reference to that matter and must concern itself solely with the evidence before you. I speak now of the concept of reasonable doubt. Counsel used that phrase in their arguments yesterday. I shall now instruct you as to

its meaning in law.

A reasonable doubt is one that arises out of the evidence in the case or the lack of evidence. It is a doubt which is substantial and not merely shadowy.

A reasonable doubt is one that appeals to your reason, to your judgment, to your common sense and to your experience. It is not an excuse to avoid performance of an unpleasant duty.

A reasonable doubt is such as would cause prudent people to hesitate before acting in matters of importance to themselves. Putting that a little differently, if you were confronted, as indeed you are here, with an important decision, and after reviewing all the factors that are pertinent to that decision you find yourself beset by uncertainty and unsure of your judgment, then you have a reasonable doubt.

Conversely, in that same situation if you have taken into account all the elements that pertain to the problem and you find that you have no uncertainty and no reservation about your judgment, then you have no reasonable doubt.

Proof beyond a reasonable doubt does not mean proof to a positive certainty or proof beyond all possible doubt. If that were the rule, few persons, however guilty,

could ever be convicted. It is practically impossible for a person to be absolutely and completely convinced of any fact which by its nature is not susceptible of mathematical certainty.

So that kind of certainty, as I have tried to indicate, is not the test. You are going to have to rely on your own common sense and general experience in evaluating the evidence.

I have said to you repeatedly that you must judge the case on the evidence. What does evidence consist of? There are generally speaking two types of evidence from which a jury may properly find the truth and the facts of the case. One is direct evidence, such as the testimony of an eyewitness or a participant. The other is indirect or circumstantial evidence, the proof of a chain of circumstances pointing to the existence or nonexistence of certain facts.

In order to prove a fact by circumstantial evidence, there must be positive proof of some fact which, though true, does not itself directly establish the fact in dispute but does afford basis for a reasonable inference of its existence.

The fact or facts upon which it is sought to base an inference must be shown and not left to rest in

conjecture, and when shown it must appear that the inference drawn is the only one that can fairly and reasonably be drawn from the facts, and that any other explanation is fairly and reasonably excluded.

A common example given to juries of circumstantial evidence in explanation of what I have just said is the following:

Suppose at the time you came into court this morning the sun was shining and there were no clouds in the sky and when you came into this trial courtroom the shades were drawn and the blinds were down so you couldn't see outside, and then pretty soon somebody came through the door, walking into the courtroom with a dripping umbrella and a dripping raincoat.

You haven't been outside in the meantime. When you left outside it was clear. But when these people came in with their dripping umbrellas and raincoats, something may have happened outside. You would be entitled to infer from the circumstances that where there is a dripping umbrealla nd a raincoat, it is raining outside. Thus, circumstantially you would infer from a fact, the dripping raincoat and umbrella, some other matter, the rain outside.

The mind is led circumstantially from a fact to

reach another fact. That will give you an illustration of what circumstantial evidence is and what it might lead to. It is not necessary that the participation or lack of participation of a defendant in any crime be shown by direct evidence.

The connection may be inferred from such facts and circumstances as legitimately tend to sustain that inference. In this case, of course, each side has produced both direct and indirect or circumstantial evidence.

The Government contends that its evidence establishes each defendant's guilt. Each defendant contends that no evidence has overcome the presumption of his innocence and that, at least, there is a reasonable doubt of his guilt.

You apply to all the evidence the same standard of proof. It must satisfy you of the guilt of a defendant beyond a reasonable doubt, or else you must acquit that defendant.

In evaluating the evidence which has been placed before you, you will determine the reliability of the witnesses you have heard and the extent to which you can count on any or all of them for accurate accounts of the facts. You have had an opportunity to observe the witnesses as they have testified. You want to be asking yourselves and thinking together how each witness impressed you. Did

the witness appear to be truthful, candid, frank, forthright, or did the witness seem to be evasive or shifty or suspect in some other way? Did the witness appear to know what he was talking about and did he impress you as having a purpose to report his knowledge to you truthfully and accurately? Was he consistent or self-contradictory? How did the manner and the matter of his direct testimony compare with his manner and matter of testimony tested on cross examination?

You should consider not only the intrinsic persuasiveness of each person's testimony by itself, but its setting in the circumstances of the whole case. For example, the degree to which any particular item of testimony is corroborated or contradicted by other evidence in the case, and all such things you will test by your own mature judgment about life, about people, about human behavior.

A witness may be discredited or, as we lawyers say, impeached, by contradictory evidence or by evidence that at other times he made statements inconsistent with his testimony here on the witness stand. You should consider among other things the question of interest or motive. The witnesses have identified their backgrounds and associations. You may wish to consider whether the

witness may have had inducements or incentives or motives to shade the truth or has bias of one kind or another that may have led the witness, consciously or not, to give you less than a completely accurate account of the facts he purported to portray.

If you believe that a witness has wilfully sworn falsely before you on any question or issue in the case, you are free to disregard all his testimony or to accept and credit such parts of it as your judgment indicates should be accepted.

The testimony of an informer and that of an accomplice who provides evidence against a defendant on trial must be examined and weighed by the jury with greater care and caution than the testimony of an ordinary witness. The fact that these witnesses have pleaded guilty or that they may have motives for testifying falsely does not necessarily show that they were testifying falsely.

The unsupported testimony of an accomplice, if credited by the jury, is sufficient on which to convict a defendant on trial when the Government has sustained its burden of proof. It is for you to say whether or not you credit such testimony. Prior conviction of a felony does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining

the credibility of the witness. The statements of a witness under oath before trial in a hearing or proceeding or a deposition subject to the penalty of perjury, which statements are inconsistent with the witness' testimony on the trial, are to be considered as evidence of the truth of the matter asserted, which the jury may consider with all the other evidence in the case.

However, if the prior inconsistent statement was not made under oath, it may be considered only for the purpose of casting doubt upon the credibility of the witness' testimony at the trial.

If a potential witness could have been called by the Government or by a defendant and neither side called him, then you may infer that the testimony of the absent witness might have been unfavorable either to the Government or to the defendant or to both of them.

On the other hand, it is equally within your province to draw no inference at all from the failure of either side to call a witness. I remind you, however, that the innocence of the defendants is presumed in law. They are under no obligation to call any witnesses. It is the Government's burden to prove the defendants' guilt beyond a reasonable doubt.

I turn now to the indictment. The nine counts

of the indictment with which you are concerned fall into two major categories. Count 1 charges a conspiracy. The remaining 8 counts, which I shall call the substantive counts, charge all the defendants with separate violations of the particular United States statute specified in Count 1 of the indictment.

Count 1, the conspiracy count, charges that from March 1, 1972 up to and including the date of the indictment, all the defendants and co-conspirators conspired to violate the Federal Securities Fraud statute which is incorporated into the Securities Act of 1933.

The indictment charges that the object of the conspiracy was that the defendants and their co-conspirators unlawfully, wilfully and knowingly would in the offer and sale of securities, namely American Home Products Corporation stock certificates, which were obtained as replacements for counterfeited American Home Products stock certificates and sold through an account opened in the name of Gerald L. Smith at Seed Capital Corporation, by use of the means and instruments of transportation and communication in interstate commerce and by use of the mails, directly and indirectly, would A, employ devices, schemes and artifices to defaud, B, obtain money and property by means of untrue statements of

material facts and omissions to state material facts necessary in order to make the statements made in the light of the circumstances under which they were made not misleading, and C, engage in transactions, practices and correspondence of business which operate and did operate as a fraud and deceit upon the purchasers by, among other things, selling or causing to be sold approximately $1,400,000 in newly issued American Home Products Corporation stock certificates which had been acquired in exchange for counterfeit stock certificates of that company.

As I have said, the defendants are charged with a conspiracy to violate the Securities Act of 1933. One of the major purposes of that Act was to foster the full and fair disclosure of all material facts to prospective purchasers of securities.

It does this so that the public will have access to information necessary to make a truthful, realistic appraisal of the merits of the securities offered for sale, and thus exercise an informed judgment in deciding whether to buy them.

One of the means used by the Securities Act of 1933 to accomplish its objective is by 15 United States Code Section 77(q)(a) which prohibits schemes to defraud, untrue statements and fraudulent practices by use of the

mails in the sale of securities. That is the section which you will see in the indictment and which is involved in this case, that section, among others. It is that particular statute which the defendants are charged with having conspired to violate. The conspiracy is charged in Count 1 of the indictment.

What is a conspiracy? It is a combination or agreement of two or more persons or concerted action by two or more persons to accomplish a criminal or unlawful purpose, in essence, a partnership in crime.

A conspiracy presents a greater potential threat to the Government and to society than the lone wrongdoer. That is why it is a separate crime. Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which the individual acting alone could accomplish.

Moreover, group association increases the likelihood that the criminal object will be successfully realized and renders detection more difficult than in the instance of the sole wrongdoer. It is because of these and other reasons that the Congress made a conspiracy or a concerted action to violate a federal law a crime entirely separate, distinct and different from the actual violation of the substantive law which may be the object

of the conspiracy.

The gist of the crime of conspiracy is the unlawful combination or agreement or scheme to violate the law. The success or lack of success of the plot or agreement or scheme does not matter.

As I have already told you, a conspiracy is a crime entirely distinct and separate from the substantive crime itself. In order to prove the crimes alleged in Count 1, the conspiracy count, the Government must establish the following elements beyond a reasonable doubt:

First, existence of the conspiracy charged in the indictment; second, that it was part of the conspiracy unlawfully to violate the provisions of one or more of the federal statutes specified in Count 1; third, that the defendant you are considering knowingly and wilfully became a participant in the conspiracy; and fourth, that at least one of the co-conspirators knowingly committed at least one of the overt acts set forth in the indictment in the Southern District of New York during the period of the existence of the conspiracy.

If the Government fails to establish each of these elements beyond a reasonable doubt, then you must acquit the particular defendant under consideration.

If, on the other hand, it has been established

each element beyond a reasonable doubt, then you must find that defendant guilty of conspiracy. It is not necessary that a conspiracy be established by direct evidence in order to convict. In fact, it can rarely be proved in that fashion, for the reason that people seldom sit down and sign agreements to engage in an unlawful scheme or activity, much less have them notarized or made known to the public. That type of conduct would be extraordinary.

It is sufficient if two or more persons in any manner, impliedly or tacitly, come to a common understanding to violate the law. It is not necessary that the persons charged enter into a formal agreement or that they state all the details of their agreement or scheme or how it is to be effectuated. Conspiracy is generally a matter of inference to be drawn from the conduct of the persons' charged. Actions may often speak louder than words, and the defendants' participation in a conspiracy may be inferred from such facts and circumstances in evidence as appear to you logically to support or sustain such an inference.

It is sufficient that it be shown beyond a reasonable doubt that the defendant and a co-conspirator came to a mutual understanding to accomplish an unlawful

act.

To determine whether a conspiracy existed you piece together the independent evidence relating to each alleged conspirator and determine, looking at the whole picture, whether the acts, conduct and statements establish to your satisfaction beyond a reasonable doubt that there was a conspiracy.

If, for example, there was concerted action among several persons with each of them doing something related to the acts of others, all of which contributed in the same or similar manner toward the accomplishment of some unlawful objective, such evidence would support the inference that those persons had conspired together to accomplish that unlawful purpose.

An unlawful agreement may exist even though the individual conspirators may have done some acts in furtherance of a common unlawful purpose, apart from and unknown to the others.

If you conclude that a conspiracy as charged did exist, you must next find that what the conspirators intended to do would have violated one or more of the following provisions of 15 United States Code, Section 77(x), the statutes referred to in the conspiracy count, Count 1 of the indictment. 15 United States Code Section

77 (8)(a) states, "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly, 1, to employ any device, scheme or artifice to defraud, or 2, to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made not misleading, or, 3, to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Any person who wilfully violates this provision is guilty of a crime under Title 15 United States Code Section 77(q). 15 United States Code Section 77(x) provides for certain penalties if a person"wilfully violates"any of the provisions of the prior section I have just read to you.

I shall instruct you further at a later point in this charge as to the precise elements that the Government must prove to establish substantive violations of these statutes.

For the present, however, I wish to concentrate

on the additional elements of a conspiracy, reminding you again that a conspiracy is a separate and distinct crime from the actual substantive violation.

If you conclude that a conspiracy as charged did exist, namely that there was a conspiracy and that one of its purposes was to violate this particular statute, you must next determine whether the individual defendant you are considering was a member, that is whether he participated in the conspiracy wilfully, with specific criminal intent, with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

An act or a failure to act is knowingly done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

An act or a failure to act is wilfully done if done voluntarily and intentionally and with bad purpose either to disobey or to disregard the law. It is important to remember that in deciding this question of participation, you must look only at the words and deeds of the defendant whom you are considering as shown by the evidence before you.

The actions of others do not determine whether a particular individual is a participant. The words and deeds of each defendant you are considering and the legitmate

inferences therefrom alone will determine whether he is or is not a member of a conspiracy. Proof of a particular individual's participation must be substantial and not slight. Thus, in considering whether a particular defendant was a member of the conspiracy, you must do so independently of the acts of the other alleged co-conspirators.

In other words, whether or not Mr. Brown or Mr. Daly was a member of the conspiracy or joined the conspiracy must be determined on the evidence which you accept as to his own actions, his own conduct, his own statements and declarations, his own connections with the acts and the conduct of the other alleged conspirators, and not on the independent acts and statements of anyone else; and you are the sole judges of the evidence on those points.

A defendant's participation in the conspiracy, like its existence, can be inferred from such facts and circumstances in evidence. It is not required that a person be a member of a conspiracy from its start. He may join it at any point during its progress and be held responsible for all that has been done before he joined and that may be done thereafter or during its existence and while he remains a member, that is so long as he is a member of the conspiracy.

Simply stated, using the partnership analogy again, by becoming a partner he assumes all the liabilities of the partnership, including those incurred before he became a member, nor is it required that he know all the members of the conspiracy. It is not necessary that the defendant be fully informed as to the details of the scope of the conspiracy in order to justify an inference of knowledge on his part.

Omniscience regarding every aspect of the conspiracy is not indispensable to a finding of knowledge of the illicit purposes and the nature of the operation of the conspiracy. Legitimate and reasonable inferences of such knowledge can be drawn from circumstantial as well as direct evidence, and, as I have explained, it is immaterial whether the defendant knew the full extent of the conspiracy and all of its activities and actors.

In determining whether the defendant was a member of the conspiracy, you must determine whether he participated with knowledge of its unlawful purpose. Knowledge is a matter of inference from the facts proved. As I have said, it is not necessary that one be fully informed as to the details and scope of the conspiracy or be acquainted with all of the conspirators in order to justify

an inference of knowledge. The question is, did he join the others with an awareness of at least some of the basic purposes and aims of the conspiracy. If so, then he adopts as his own the past and future acts of all the other conspirators. The guilt of a conspirator is not measured by the extent or duration of his participation. Even if he entered into the conspiracy after it was formed or if he participated in it to a degree more limited than of his co-conspirators, he is equally culpable, so long as he was in fact a conspirator.

I want to caution you that mere presence or association with one or more conspirators does not make one a member of a conspiracy, nor is knowledge of a conspiracy without participation therein sufficient to constitute membership.

However, I also instruct you that the silence of an individual in the face of a communication made to others in his presence may be considered by you as evidence of his adoption or assent to such communication. You must consider as to each defendant all the circumstances revealed by the evidence which you accept. What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful

ends.

In short, a person becomes a member of a conspiracy by assocating himself, even though informally, with the common plan or scheme, knowing its central aim or purpose, and intending to aid in bringing about the success of the plan or scheme.

An agreement to accomplish an unlawful object does not cease to be a single conspiracy because it continues over a period of time or because there exists a time gap in the proof or a change in the membership. The agrement may continue for a long period of time and include the performance of many transactions.

New parties may join the agreement at any time while others may terminate their relationship. The fact that the parties are not always identical or were not in direct contact does not mean that there are separate conspiracies.

While the conspiracy may have a small group of core conspirators, other parties who knowingly participate with these core conspirators and others to achieve a common goal may be members of an overall conspiracy.

It follows from what I have just said that the guilt of a conspirator is not measured by the extent or the duration of his participation, nor is it necessary

in law that a defendant receive money as the result of his participation in the conspiracy, as long as he in fact participated in it in the way I have instructed.

Where the Government charges that a particular defendant participated in a conspiracy, and the defendant by his plea of not guilty denies the truth of the charge, then whether or not the evidence shows that the defendant received a portion of the spoils of the scheme may be considered by you as one of the circumstances, among others, showing participation or non-participation in the scheme, but it does not necessarily follow that one who does not benefit from a conspiracy was not in fact a conspirator.

In essence, the questions are what was the nature of the agreement and who were the parties to the agreement. That is for you to determine after examining all the evidence. If you find that the Government has sustained the element as to a particular defendant's participation, we reach the final element.

I have already mentioned that the fourth essential element of the crime of conspiracy is that an overt act intended to effect the object of the conspiracy be committed by at least one of the co-conspirators after the unlawful agreement has been made. An overt act

is any step, action or conduct which is taken to achieve, accomplish or further the objective of the conspiracy. The purpose of requiring proof of an overt act is that while parties might conspire and agree to violate the law, yet they may change their minds and do nothing to carry it into effect, in which event it will not constitute an offense.

The overt act to further the objective of the conspiracy can be a perfectly lawful act. It need be neither a criminal act nor the very crime which is the object of the conspiracy. It is any act or statement in the carrying out of the plan. It is not necessary for the Government to prove that each member of a conspiracy committed or participated in one particular overt act, since the act of any one conspirator done in furtherance of the conspiracy becomes the act of all the other members.

Thus, the Government is not required to prove all of the overt acts as alleged in the indictment. It is sufficient if it proves the commission by any co-conspirator of at least any one of those acts in the Southern District of New York, in furtherance of the objectives of the conspiracy, within the period of the existence of the conspiracy.

I will now call your attention to the overt

acts that have been set forth. When you get copies of the indictment, you will be able to read them again for yourselves. The indictment charges as overt acts in furtherance of the said conspiracy and to effect the objects thereof, the defendants and their co-conspirators committed the following overt acts, among others, in the Southern District of New York, or elsewhere: A, In or about the early summer of 1972 the Defendant James Leonard Brown met with co-conspirators Chester Gray and Frederick Horwitz in New York, N.Y.

This particular overt act, before I go any further, illustrates what I just said to you. The act I just read to you could be considered a perfectly lawful act. But if it was part of a scheme to carry out a conspiracy and in furtherance of that scheme and conspiracy, then it becomes an overt act to show that the conspiracy is in operation.

The remaining overt acts charged are: B, In or about the early summer of 1972, the defendants Arthur Daly and John Krappman met in Brooklyn, New York.

C, In or about the summer of 1972 the defendants John Krappman, Arthur Daly and James Leonard Brown met with co-conspirator Chester Gray in Queens, New York.

D, On or about May 9, 1972 the defendant -- I'm

sorry, I should not say defendant, the co-conspirator, he is not presently a defendant, John Krappman, took American Home Products stock certificates from the stock transfer department at Manufacturers Hanover Trust Company, 4 New York Plaza.

E, in or about the late summer of 1972 co-conspirator Frederick Horwitz delivered packages of counterfeit American Home Products stock certificates to Robert Smith and to Chester Gray in New York, N.Y.

F, In or about the summer of 1972 co-conspirators Quido Benigno and Arthur Caponegro and co-conspirator James Phillips, posing as a man called George, met at the offices of Seed Capital Corporation, 61 Broadway, New York.

G, On or about September 12, 1972 the co-conspirator Harvey Axelrod posing as the real Gerald L. Smith opened a brokerage account and signed a signature account card in the name Gerald L. Smith at Seed Capital Corporation.

H, On or about October 10, 1972 the co-conspirator Harvey Axelrod caused shares of counterfeit American Home stock certificates to be delivered to the offices of Seed Capital for deposit into the false Gerald L. Smith account.

I, On or about October 11, 1972 the co-conspirator Arthur Caponegro caused Seed Capital Corporation to deliver to Manufacturers Hanover Trust Company New York,

counterfeit American Home Products stock certificates in the name of Gerald L. Smith for transfer into several smaller denominations of newly issued American Home Products stock certificates, also in the name of Gerald L. Smith.

J, On or about October 12, 1972 the co-conspirator Arthur Caponegro made telephone calls from the offices of Seed Capital Corporation.

K, On or about October 20, 1972 the co-conspirator Arthur Caponegro caused checks in the amount of approximately $242,681 to be drawn on Seed Capital Corporation at Irving Trust Company.

L, On or about October 20, 1972 co-conspirators Axelrod and Benigno obtained approximately $200,000 from Irving Trust.

M, On or about October 25, 1972 co-conspirators Axelrod and Benigno obtained approximately $273,623 from Irving Trust.

N, On or about November 8, 1972 co-conspirator Benigno obtained approximately $820,578 from Irving Trust.

O, On or about November 9, 1972 co-conspirator Caponegro caused Seed Capital to deliver to Manufacturers Hanover Trust Company counterfeit American Home Products Corporation stock certificates.

The fourth element of a criminal conspiracy

is satisfied if any one of the alleged overt acts was committed by a co-conspirator, not necessarily one of the defendants, in furtherance of the conspiracy. I now take up the substantive counts. I have concluded the basic charge on conspiracy.

Before I proceed to the substantive counts, you might just want to sit back for a moment and relax. I am about to start on a somewhat different aspect of the charge.

THE FORELADY: May we take a break for five minutes?

THE COURT: Sure. We will take a break for five minutes. Please do not discuss the case at all, ladies and gentlemen.

(Recess.)

THE COURT: Before turning to the substantive crimes, let me just recapitulate on conspiracy.

To find either of these defendants guilty the Government must show as to that defendant each of the four essential elements:

(1) The existence of the conspiracy charged;

(2) That a purpose of the conspiracy was to violate the Federal Securities Law;

(3) That the defendant in question was a knowing and wilful participant in the conspiracy; and

(4) That at least one co-conspirator committed one of the overt acts in the Southern District of New York.

Please remember that with respect to the defendant you are considering, the Government must prove each of these four elements beyond a reasonable doubt. I have already instructed you on the meaning of reasonable doubt. If each of the four elements has been so proved as to a particular defendant, you must convict him of conspiracy.

On the other hand, if any of the elements has not been so proved as to a particular defendant, you must acquit him of conspiracy.

I now take up the substantive counts. Remember that the defendants are charged with both conspiracy to violate a law and with the actual violation of that

law. These are separate crimes. Counts 2 through 9 are the counts that contain the substantive counts.

The law said to be violated is the antifraud provision of the 1933 Securities Act, Section 77(q)(a).

I recognize I read it to you before in connection with conspiracy, but I want to read it again to you now within the context of the substantive crime.

Section 77(q)(a) reads as follows:

"It shall be unlawful for any person in the offer or sale of any securities, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly, (1), to employ any device, scheme or artifice to defraud, or (2), to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make statements made in the light of the circumstances under which they were made not misleading, or (3), to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser."

As you can see, the substance of this section is that it is unlawful in the offer or sale of a security to employ the mails or other means of interstate commerce or interstate communication in furtherance of any fraudulent

lhb-3

or deceitful scheme, practice or course of business or in any attempt to obtain money through material misrepresentations or through omissions of a material fact which would be necessary to make the information given not misleading, and such conduct is declared to be unlawful by the Federal Securities Act of 1933.

Before I go forward,I want to call the following to your attention. What I have just read to you refers to the action taken by defendants, and you may be wondering whether that means that each defendant must have sent some sort of letter of confirmation or actually participated or performed one of the acts referred to in the statute.

It is not necessary for the Government to show that the defendant you are considering himself physically committed the crimes alleged in Counts 2 to 9. Section 2 of Title 18, United States Code, provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself.

The indictment in the substantive counts, 2 through 9, also alleges violation of that statute, 18 United States Code,Section 2.

That statute reads in pertinent part: "Whoever commits an offense against the United States or aids or abets or counsels or commands or induces or procures its

commission is punishable as a principal."

Accordingly, you may find beyond a reasonable doubt that a co-defendant committed the offense or that a co-conspirator committed the offense and that the defendant aided and abetted. But I am not speaking in terms of conspiracy at the present within the context of the substantive crime, so I will instruct you again that it is possible under the statute to which I have just referred dthat you may find beyond a reasonable doubt that a co-defendant committed the offense and the defendant in particular whom you are considering aided and abetted.

To determine whether a particular defendant aided and abetted the commission of an offense, you ask yourself these questions: Did he associate himself with the venture? Did he participate in it as something he wished to bring about? Did he seek by his action to make it succeed? If he did, then he is an aider and abettor.

Remember, however, that mere knowledge of the crime as being committed is not sufficient to convict a defendant. There is another alternative basis upon which you may find the defendant guilty on each of the substantive counts in which he is named, even if you are not satisfied as to that defendant of the necessary elements of the crime.

And let me state to you now the necessary elements for a violation of this particular statute. They are three in number.

First, that a person in the offer or sale of a security engaged in a scheme to defraud or to obtain money and property by means of untrue statements of material facts or omissions to state material facts, if necessary, in order to make his statements not misleading.

The second element is that the person did so wilfully and knowingly, and the third necessary element is that the person used or caused to be used the mails or means of communication in furtherance of the scheme.

I have said that there is an alternative basis upon which you may find the defendant guilty on these substantive counts, even if you are not satisfied as to that defendant that each of these particular elements have been proved beyond a reasonable doubt as to that defendant.

The alternative basis is as follows. If you find beyond a reasonable doubt that the substantive offense alleged in the substantive counts were committed by one or more members of the alleged conspiracy, that the defendant you are considering was then a member of that conspiracy, and that the acts which constituted those substantive offenses were done in furtherance of a portion

of that conspiracy of which that defendant was a member, and that the defendant might reasonably have foreseen that those acts would be done in the course of and to further that conspiracy, then you may find that particular defendant to be guilty of the substantive offenses alleged in the substantive counts in which he is named, even though he did not otherwise personally participate in the acts constituting those offenses or did not have knowledge of them.

That follows from the theory of partnership in crime, and that particular alternative method of determining guilt of the substantive crime depends, of course, upon an affirmative finding of a conspiracy. So as I read these essential elements to you of the securities fraud and of false statements where reference is made to action having been taken by a defendant, you will bear in mind that if his partner did it and he was a member of that partnership and it was done in furtherance and to carry out the objectives of the partnership,he is just as guilty as the conspirator who did it.

I want to go back and read to you again the essential elements of securities fraud as charged in Counts 2 to 9, so that this interruption and explanation will not have lost the thread in your minds.

I say again they are three in number, these elements. First, that a person in the offer or sale of a security engaged in a scheme to defraud or to obtain money and property by means of untrue statements of material facts or omissions to state material facts, if necessary, in order to make his statements not misleading.

The second element, that the person did so wilfully and knowingly.

The third element, that the person used or caused to be used the mails or other means of communication in furtherance of the scheme.

The Government must prove beyond a reasonable doubt as to the count that you are considering each of those elements.

The first element of the securities fraud count is the existence of the scheme or artifice to defraud.

The language describing the first element is almost self-explanatory. A scheme or artifice is merely a plan for the accomplishment of an object. Such a scheme or artifice may be found to exist without evidence of any formal action to make it effective.

Fraud is a generic term which embraces all the many means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over

lhb-8

another by false representations or by suggestions or by suppression of the truth.

Thus, a scheme or artifice to defraud is any plan or device by which one seeks to induce another to act in a way detrimental to his interests by means of the representations of a material fact or omissions which are false and untrue.

Such representations may be made in two ways: By statements of a material fact which are just not true and by the omission of a statement purporting to state a particular fact or facts or other material facts which are necessary to a proper understanding of the truth of the matter stated and the nature of the transaction.

In other words, once having undertaken to state the fact or facts, there is an obligation on the one who does so not to give such a distorted picture of them as to make the statements misleading concerning what the actual facts really are.

Sometimes a half truth is no better than an outright falsehood and a fraudulent representation may be effected by half truths calculated to mislead.

Having chosen to speak, there is an obligation to state all the facts which are necessary to a proper understanding of the particular subject matter which is

lhb-9

being covered.

A statement, although literally true, is nonetheless false if when interpreted in the light of the effect it would produce on the minds of those whom it was calculated to influence it would create a false impression of the true state of affairs.

I have spoken of material facts. By that I mean simply facts which could reasonably be expected to induce a person to decide whether to act or not to act, and in this case to purchase or not to purchase the shares of American Home Products Corporation stock, which the Government charges the defendants caused to be offered for sale.

The Government further charges that the defendants failed to state in connection with such sales that the shares being offered for sale had come into being in exchange for counterfeit shares and that the signature Gerald L. Smith on the shares authorizing their transfer was a forgery.

I have told you that the second element of the securities fraud chargeis the requirement that the act should be wilfully and knowingly done. This second element of the securities fraud charge which the Government must establish beyond a reasonable doubt is that when and

lhb-10

if the defendant did the acts with which he is charged, he acted wilfully and knowingly, the defendant or his partner in crime, if there be any.

The word "knowingly" means that the defendant acted purposefully and deliberately. As used here, wilfully means intentionally with a bad purpose and specific intent to do that which the law forbids.

In other words, to convict on any particular substantive count, you must find that as to that count the defendant you are considering purposely did himself or through his partner, if he had one, the acts with which he is charged and did not carelessly or negligently or through inadvertent error,mistake,or something of that nature do the act.

Under these statutes, a false representation or omission to state a material fact does not amount to a fraud unless it is made with fraudulent intent. However misleading or deceptive the plan may be, the use of the mails to execute it does not constitute a crime, if the plan was devised in good faith.

Honesty and good faith on the part of a defendant is always a good defense to the charges in these counts, and an honest belief in the truth of the representations made by him is a good defense, however inaccurate

the statements may turn out to be. The significant fact is the specific criminal intent and the bad purpose with which the defendant acted.

The mere fact that a statement may be incorrect or even a gross misrepresentation of the facts does not amount to a fraud in the law, unless the statement was made by the defendant knowingly and wilfully and with the specific intent to deceive.

The question of the defendant's knowledge and his intent and his wilfulness is a question of fact you must decide in this case, but unlike most other questions of fact it involves what is in a person's mind or the purpose which motivates him in a given course of conduct. Obviously,we have not yet devised, and perhaps it is well if we never do, an instrument to record what goes on in a man or a woman's mind. Rarely is direct proof available that a man has knowledge of a particular act or has a particular purpose in mind when he acts.

On occasion he may write a letter or admittedly have knowledge that a statement was false or acknowledge orally that he had an evil or forbidden purpose, but that is rare.

Plainly, it is the exception rather than the rule. Thus,direct proof of the knowledge of the falsity

lhb-12

under wilful and wrongful intent is not necessary. Usually such knowledge or purpose is established by circumstantial evidence and determined from the acts and conduct and all the circumstances and the natural inferences that you may draw therefrom. Fraudulent intent may be inferred from the intent of one party to the transaction to deprive another of the knowledge to bargain with the facts before him.

Thus, where false representations are made as to the quality, adequacy or price of goods or property, fraudulent intent may be inferred, if the jury so decides from the fact that the victim was made to bargain without facts obviously essential in deciding whether to enter into the transaction.

I have previously instructed you on the meaning of false statements and misrepresentations. Remember that they may be made either by statements which are direct untruths, such as to say that something happened when it did not, or by statements or half truths, leaving out a part of the facts necessary to an understanding of the complete truth.

Remember also that the misrepresentations must be material, that is of such a nature that it would tend to influence a reasonable person's decision whether to act

or not.

If you find that the defendant under consideration knowingly and wilfully engaged in a scheme to defraud, you must then consider the next element of the offense charged, that is whether the mails or telephones, but it is just mails in this case, were used or caused to be used in furtherance of that scheme.

This third element of the offense is what we call the jurisdictional element. Congress has provided in the Securities Act that the fraudulent sale of stock is a Federal offense if, among other things, the defendants in any way, directly or indirectly, used the mail or other means or instruments of interstate commerce or caused someone else to do so in connection with such a sale or offer to sell stock.

It is for you to decide upon the evidence and the reasonable inferences which that evidence will support whether the Government has proven beyond a reasonable doubt that a particular defendant by his personal acts or actions in some way directly or indirectly caused the use of the mails as charged in these counts.

Here the Government relies upon the confirmation slips made out as a result of the sales and purchases of American Home Products stock. That is why the

different counts refer to the confirmation slips.

You will see them listed in Counts 2 through 9. It is not necessary that a particular defendant himself actually mailed the confirmation slips. The mailing can be between third persons. Thus, the defendant may be found to have caused the confirmation to be mailed to a third party , even though the particular defendant did not himself use such mode of transmission, provided that such mode of transmission might have been reasonably foreseen.

It is not necessary that the matter mailed contain in itself anything criminal or objectionable or any misrepresentations or disclose a fraudulent purpose or show that it was in furtherance of the scheme. The manner of mailing may be wholly innocuous in itself. All that is necessary is that it be designed to aid or further the execution of the scheme.

I will add finally on this element, that although the statute refers to interstate commerce, there is no requirement of proof that the mailed confirmation slips crossed state lines. In other words, a mailing within New York State itself is sufficient. Thus, to reiterate, in order to convict a defendant of any of these substantive counts, you must find beyond a reasonable doubt as to the

lhb-15

ount you are considering each of the following elements:

First, that in connection with the offer or sale of the securities the defendant engaged in a scheme or artifice to defraud or to obtain money or property by means of untrue statements of material facts or omissions to state material facts necessary in order to make the statements not misleading or engaged in a transaction, practice or course of business which would or did operate as a fraud or deceit upon the purchasers of that security; secondly, that the defendant did so wilfully and knowingly; and, third, that the defendant used or caused to be used the mails in furtherance of the scheme.

I instruct you that American Home Products stock is a security for the purpose of the securities fraud laws.

I further instruct you that overt acts which took place within New York, N.Y., took place within the Southern District of New York.

I further instruct you that an offer or sale of a security includes every contract of sale or disposition of the security or of an interest in the security for value.

Thus, for example, an offer or sale of the security occurred when a security is sold for money

or when it is changed for property, such as a fur coat, or when it is pledged to secure a loan from a bank or other lender or when it is pledged to provide further security for an existing loan or debt.

Proof of motive is not a necessary element of the crimes with which the defendants are charged. Proof of motive does not establish guilt nor does want of proof of motive establish that a defendant is innocent.

If the guilt of a defendant is shown beyond a reasonable doubt, it is immaterial what the motive for the crime may be or whether any motive may be shown, but the presence or absence of motive is a circumstance which the jury may consider as bearing on the intent of a defendant.

Ladies and gentlemen, use your common sense in evaluating the evidence, the circumstances and the probabilities. Do not allow yourselves to be swayed or carried away or inflamed by appeals to passion or sympathy. Suspicion and conjecture should not be substituted for proof or evidence. Suspicion and conjecture are not evidence. You must maintain a calm, clear view of the case and not be sidetracked by anybody or anything from a fair,dispassionate consideration of the evidence in arriving at your resolution of the facts.

Under your oath as jurors, you cannot allow any consideration of the punishment which might be inflicted upon a defendant, if convicted, to influence your verdict in any way or in any sense enter into your deliberations. The duty of imposing sentence rests exclusively upo n this Court. Your function is to weigh the evidence in the case and determine whether the defendant is guilty or not guilty, solely on the basis of the evidence and the law.

You are to decide the case upon the evidence and the evidence alone, and, I repeat, you must not be influenced by any assumptions, conjectures, sympathy or any inference not warranted by the facts, unless proved to your satisfaction.

I want you to listen to each other carefully in the jury room when you consider the matter. If you think you are wrong and somebody else is right,don't be embarrassed about changing your opinion, but, remember, each of you has to decide the case for yourself. Each defendant must be considered by you separately and each count as to that defendant must be considered separately.

A verdict of guilty or not guilty as to any count on which the respective defendant is charged, to be acceptable, must be unanimous. You may, if you wish, report your verdicts separately from time to time as you

lhb-18

reach them unanimously, if that will aid you in your deliberations, or you may wait until you have concluded your deliberations.

That is entirely up to you, I just wished to make it plain to you, that if in the course of your deliberations you have still not decided certain issues, but you have reached a conclusion as to the guilt or innocence of a particular defendant on any particular count, it is entirely proper for you to so advise the marshal and the clerk, ask to come back and record that part of the verdict and then go back and resume your deliberations on such issues as you have not yet decided.

The oath you took right at the outset of this case really sums up what you are supposed to do, and that is without fear or favor to anybody, that you will well and truly try the issues according to the evidence and the law as stated to you in this charge.

If you desire any exhibits, they will be sent to you in the jury room upon your request. If you want any of the testimony read, that can be done also. I will have copies of the indictment made available to you shortly. Please do not communicate with anyone concerning your deliberations about this case or how you stand, except in writing, signed by your forelady, and she will be provided

with a pencil and paper by the marshals.

I have concluded my charge,but I want to take a moment to talk to the lawyers in the robing room, because they may wish to call my attention to any matter that I may have overlooked or some aspect of my charge in which I may have misspoken myself.

I will ask you to just stay there for a moment and relax again, if you will, and I will consider with counsel in the robing room the question of any exceptions or requests on the charge.

(In the robing room.)

THE COURT: Does the Government have any exceptions to the charge?

MR.LUTZ: Not at the moment, your Honor. We have one thing that you gave, but I don't know at this point that it matters.

I would like to hear if anybody else has anything.

THE COURT: Mr. Pollack, any exceptions to the charge?

MR.POLLACK: Yes, your Honor.

I except to the Court's stating that five defendants have pleaded guilty to the indictment. This was not requested by the defendant and it is not included

lhb-20

in the request to charge Number 1, which the Court stated it would give in substance.

I think it greatly prejudices both the defendant Daly and the defendant Brown. The only thing I am constrained to do is ask that a juror be withdrawn and a mistrial be declared because of that.

THE COURT: I will overrule the exception. The jury will have the indictment before it. That fact is apparent. In addition to that, I consider that Ihave adequately covered the fact that no inference is to be drawn from guilty pleas in respect of the innocence or guilt of these particular defendants.

Consequently, I overrule the exception and deny the motion for a mistrial.

MR. KLEMPNER: Judge, before Mr.Pollack moves on, may I just be heard on this one point?

THE COURT: Sure.

MR. KLEMPNER: I join in Mr.Pollack's motion. The Court will recall that I made an issue of this fact even during I think the voir dire of the jury, during jury selection, when I asked the Court to have removed a calendar or docket list in thelobby of the courtroom on this floor where I know it was written that five of the defendants had pleaded guilty.

lhb-21

I know that this Court reacted by, I believe, having a written instruction directed and causing the removal of that docket sheet. So we put the Court on notice very early that we objected to the jury knowing that defendants who were not going to testify here, their status would not be known by the jury.

As regards the Court giving a copy of the indictment to the jury, I don't believe that that requires the jury knowing the status of defendants who haven't testified here. Certainly they would not know from that what the status of those defendants was. Certainly the indictment could have been redrawn to omit the names of other defendants who actually by their guilty pleas have been severed out.

So I join Mr. Pollack's motion and I join in his exception.

THE COURT: I make the same disposition. The possible prejudice arising out of the document that was posted in the lobby to which you referred was that the jurors might read it without considering it within the context of the Court's instructions.

I consider that the instructions adequately meet the point. I deny your exception and motion as well.

MR. POLLACK: Your Honor, I would object to

the Court's statement on reasonable doubt, stating it is impossible to be absolutely and completely convinced. I think that a jury should be told that it is impossible to be convinced to an absolute certainty, but they must be convinced beyond a reasonable doubt.

I think the terms"absolute and complete" are an improper statements of the standard.

THE COURT: I overrule the exception. I think that the charge on the concept of reasonable doubt is sufficient and proper.

MR.POLLACK: I would object to any charge on subsections (b) and (c) of the statute as not being borne out by any evidence before this jury.

THE COURT: I overrule that exception.

MR.POLLACK: When the Court went into the fourth element of conspiracy, it stated that any overt act by any co-conspirator may be sufficient to prove a conspiracy. I ask the Court to reemphasize the fact that that is only apropos if the jury finds the defendant a member of the conspiracy.

THE COURT: I overrule that exception because in my judgment the elements and the necessity of participation are adequately covered in the charge.

MR. POLLACK: The Court stated as to the

admission of a material fact, I ask, (1), the Court to give a definition of materiality, and (2), to describe -- the Court stated that the victim of the fraud had to be -- had to react -- would react differently had a material fact been communicated to him. I would like the Court to state to the jury who the victim of this crime is.

THE COURT: Let me hear that again?

MR.POLLACK: The Court stated that the omission of a fact caused the victim to rely in buying the stock.

THE COURT: I will overrule that objection, too, Mr. Pollack. I think that the question or the definition of materiality is adequately covered by the charge. The elements of the crime are also sufficiently covered. I overrule the exception.

MR.POLLACK: Under the Crimmins case in the Second Circuit, your Honor, there must be a specific intent to prove guilt of a conspiracy. Specific intent would also include specific intent to cause use of the mail to commit the crime.

I ask the Court to so instruct the jury.

THE COURT: I decline to do so.

MR. POLLACK: That is the extent of my objections.

MR. KLEMPNER: I won't repeat Mr. Pollack's exceptions because I assume the Court will rule the same.

lhb-24

Additional matters that I have, when the Court first began charging the jury about conspiracy, your Honor told the jury that if the Government fails to establish each of the elements beyond a reasonable doubt, the jury must come back with a not guilty verdict. The proper statement which I concede the Court made later on was that if the Government fails to establish any single of these elements the jury must render a not guilty verdict.

I take exception and I leave it up to the Court whether there has been sufficient restatement of the law on that point.

THE COURT: If there was a misstatement, which I do not recognize, it is my view that the necessary proof required of the Government was adequatel covered in the recapitulation on the conspiracy aspect.

MR.KLEMPNER: I object generally to the language that your Honor used in the portion of the charge which dealt with partnership in crime. I think that the effect of the Court's language may very well be to leave the jury confused and believing in general terms that they may convict a defendant even though they find a reasonable doubt as to one of the elements of the substantive crimes, and I knoow that wasn't the Court's intent, but I think that confusion may have resulted.

lhb-25

THE COURT: I overrule that exception.

MR. KLEMPNER: Finally, I ask for an additional charge. At the early stages of this trial one juror asked the Court if the jurors would be permitted to take notes, and the Court, acting within its discretion, answered in the affirmative. I would now request that your Honor caution the jury that they are not to substitute any notes they have made for their own individual recollections and that any juror would be abdicating his own function if he were to rely on the recollection of another juror on the notes of that other juror.

THE COURT: I will add that instruction.

MR. KLEMPNER: That is all I have.

MR. POLLACK: Judge, one point I would like to bring up.

MR. LUTZ: The Government concurs in that.

MR. POLLACK: Just one point,your Honor. The Court included a charge under the Pinkerton theory in this case. I think the jurors should be instructed if they find a defendant did not commit one of the substantive crimes, before they can find him guilty they must find him to be a part of the conspiracy at the time the substantive crime was committed, if they are going to apply Pinkerton. If he did not commit the crime, he did not

cause the mailing, he did not cause a transference of the stock, if they wish to consider his guilt on that particular crime, they must find that he was a member of the conspiracy on the date that that substantive crime was committed.

THE COURT: I think that is adequately covered in the charge as given.

Anything further?

MR. LUTZ: The Government has nothing further.

(In open court.)

THE COURT: There is one additional comment I will make to you after hearing counsel, ladies and gentlemen.

You may recall that at the beginning of the trial one of the jurors asked the Court if it was permissible to take notes during the trial. In the exercise of my discretion, I said yes, it was.

I don't know if notes were taken or to what extent. I will simply caution jurors that you should not substitute notes that may have been taken either by you or another juror for your own independent recollection of the evidence as it has come in.

It is now my duty to excuse the two alternate jurors, Mrs. Feinstein and Mr. Ryan. I am able to do that because happily the first chosen 12 jurors have attended the trial in full in full participation, and are now

ready to begin their deliberations. But in excusing you, you two, after your faithful and much appreciated attendance at this trial, I do not wish you to feel that you have not played a very important part in it. Your presence and your consideration of the evidence and your readiness and ability to step in and serve as one of the jurors who is going to decide the case was quite essential to the operations of the Court, and so I thank you very much for your attendance and discharge you from your further responsibilities now.

(Alternate jurors excused.)

(Marshal duly sworn.)

(The jury commenced deliberations at 12:00 noon.)

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(4:12 p.m.)

(In the robing room.)

THE COURT: I have another note from the jury. They ask we send in to them, one, the agreement between the United States Government and Mr. Axelrod, and, two, the agreement between the United States Government and Mr. Krappman. Those agreements are in evidence, and I would be grateful if you would pass them on to the jury and have them sent in. While you are all here, let me ask you one other point. Itis going on 4:15. Two of the jurors have had deaths in their family and they spoke to me personally yesterday and said that it was most important that they leave not later than 7:00 this evening in order to get to the funeral home or the wake or the prayer meeting or whatever, and of course I said that that would be arranged.

It wouldn't really have been my intention to keep them much longer than that anyway. What has been going through my mind is this:

If by, say, 5:00 o'clock it is apparent that they have still got quite a long ways to go before agreeing on anything, they could be sent home then and kept from 5:00 until 7:00 only if they indicated that they were about to agree on something and a little more

time could bring that about. That would, of course, necessitate my sending an inquiry into the jury as to whether or not they are close to an agreement on something, in which case they could sit later until 7:00, or if they weren't, go home at 5:00. I am simply not sure if that is an appropriate thing to do or not.

How do counsel feel about that?

MR. POLLACK: Judge, I'd like to let them go until about 6:00. Send them a note and ask them if they want to stay another hour or let them reconvene tomorrow.

THE COURT: I am going to let them go over until Tuesday.

MR. LUTZ: I think we better let them try to go until 6:00.

THE COURT: Go to 6:00. Send them a note than and ask them if another hour will do some good?

MR. LUTZ: Yes.

(Pause.)

THE COURT: Let the record show that Mr. Lutz has handed the Court Government's Exhibit 1, the agreement between the Government and Axelrod, and Government's Exhibit 13, the agreement between the Government Krappman. I will ask my law clerk to simply hand them in to the jury. As far as the timing of the day's deliberations, I will

* * *

DEFENDANT BROWN'S
REQUEST NO. 1
GUILTY PLEAS OF OTHER DEFENDANTS

During the trial there has been evidence that defendants other than the two who have been on trial here have pleaded guilty to one or more of the counts charged in the indictment. You are hereby instructed that the fact that such pleas were entered does not mean that the two defendants on trial are guilty with them. The pleas are not evidence that the defendants on trial are guilty, or that the crime charged in the indictment was committed by any others then those who have admitted this participation.

These pleas do not give rise to any inference as to the guilt of the two defendants here on trial. The guilt or innocence of the two defendants on trial must be determined solely by you, solely by the evidence introduced in the trial of this case.

United States v. Aronson, 319 F.2d 48 (2d Cir.1963); Wood v. United States, 279 F.2d 359 (8th Cir.1960); Koolish v. United States, 340 F.2d 513 (8th Cir.1965); United States v. Crosby, 294 F. 2d 928 (2d Cir. 1961).

U. DIST. COURT
S. D. OF N. Y.

13

AGREEMENT

It is agreed by and between John Krappman and the United States of America:

1. John Krappman shall plead guilty only to a securities count involving violations of Title 15, United States Code, Section 78j(b) and 17 CFR Section 240.10b-5, as a result of his role in a scheme involving the transfer of counterfeit American Home Products stock and the subsequent sale of counterfeit derived American Home Products stock occurring in 1972 in the Southern District of New York and elsewhere, which charge shall be contained in an information to which the aforesaid plea of guilty shall be made and on the imposition of sentence thereon an order of Dismissal shall be entered as to him on all outstanding indictments against him. It is understood and agreed by the parties hereto that John Krappman's plea of guilty to and conviction upon the charges set forth in the aforesaid information shall constitute full and complete satisfaction of all charges arising out of or in any way relating to the above described scheme that might be brought against John Krappman, provided that John Krappman complies with the provisions of paragraph 2 and 3 of this agreement.

2. John Krappman shall give testimony at trial without the grant of immunity as to his complete knowledge and participation in the above-described scheme and he shall not be prosecuted for any crime disclosed by him arising out of or in any way relating to the above-described scheme other than those set forth in paragraph 1.

3. Additionally, John Krappman agrees that he will testify truthfully as to all facts within his knowledge relating to the above-described scheme. That should John Krappman wilfully tell any untruth or testify falsely as to any material fact or matter, John Krappman will be subject to prosecution for wilfully making false statements to the Government or perjury.

4. The Government will call to the attention of the sentencing judge the nature and extent of John Krappman's cooperation. Further, the Government will not make any recommendation to the sentencing judge in terms of any specific proposal as to what sentence should be imposed. Additionally, the Government, if asked, will make known to the probation and parole authorities the nature and extent of John Krappman's cooperation.

Approved:

Attorney for
John Krappman

September 21, 1976

Consented:

John A Krappman

Special Attorney, Department
of Justice, on behalf of
United States of America

BEST COPY AVAILABLE

VERNMENT
HIBIT
IST. COURT
OF N. Y.

A G R E E M E N T

It is agreed by and between Harvey Axelrod and the United States of America:

1. Harvey Axelrod shall plead guilty only to a securities count involving violations of Title 15, United States Code, Section 78j(b) and 17 CFR Section 240.10b-5, and also to a tax count involving a violation of Title 26, United States Code, Section 7206, as a result of his role in a scheme involving the transfer of counterfeit American Home Products stock and the subsequent sale of counterfeit derived American Home Products stock occurring in 1972 in the Southern District of New York and elsewhere, which charges shall be contained in an information to which the aforesaid plea of guilty shall be made and on the imposition of sentence thereon an order of nolle prosequi shall be entered as to him on all outstanding indictments against him. It is understood and agreed by the parties hereto that Harvey Axelrod's plea of guilty to and conviction upon the charges set forth in the aforesaid information shall constitute full and complete satisfaction of all charges arising out of or in anyway relating to the above described scheme that might be brought against Harvey Axelrod, provided that Harvey Axelrod complies with the provisions of paragraph 2, 3 and 4 of this agreement.

2. Harvey Axelrod shall make a sworn statement in writing and without a grant of immunity, as to his complete knowledge and participation in the above-described

scheme within a reasonable time after the execution of this agreement and he shall not be prosecuted for any crime disclosed by him arising out of or in any way relating to the above-described scheme other than those set forth in paragraph 1.

3. Harvey Axelrod shall give testimony at trial without the grant of immunity as to his complete knowledge and participation in the above-described scheme and he shall not be prosecuted for any crime disclosed by him arising out of or in any way relating to the above-described scheme other than those set forth in paragraph 1.

4. Additionally, Harvey Axelrod agrees that he will testify truthfully as to all facts within his knowledge relating to the above-described scheme. That should Harvey Axelrod wilfully tell any untruth or testify falsely as to any material fact or matter, Harvey Axelrod will be subject to prosecution for wilfully making false statements to the Government or perjury.

5. The Government will call to the attention of the sentencing judge the nature and extent of Harvey Axelrod's cooperation. Further, the Government will not make any recommendation to the sentencing judge in terms of any specific proposal as to what sentence should be imposed.

6. The Government agrees not to pursue further any potential criminal case which it may have or acquire against Shirley Axelrod, the wife of Harvey Axelrod concerning any transactions or part thereof arising out of or in connection with or relating to any aspect of said scheme.

7. The Government agrees not to pursue against Harvey Axelrod any additional criminal tax case relating to the tax years 1972, 1973 and 1974 which it may have or acquire concerning any transactions or part thereof arising out of or in connection with or relating to any aspect of said scheme.

8. This agreement will not affect, one way or the other, the civil tax liability, if any, of Harvey Axelrod as it may relate to his involvement in the above-described scheme.

Accepted:

Shirley Axelrod

Shirley Axelrod

Consented to:

Harvey J. Axelrod

Approved:

Attorney for
Harvey Axelrod

Special Attorney, Department of Justice, on behalf of United States of America

Dated: New York, New York
May 2, 1976

AMENDED COMPLAINT IN MANUFACTURERES HANOVER TRUST COMPANY, ET AL. V. ARNOLD, ET ALS. (pp. 188a-196a)

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

MANUFACTURERS HANOVER TRUST COMPANY
and IRVING TRUST COMPANY,

Plaintiffs

-against-

AMENDED COMPLAINT

JACK J. ARNOLD, GUIDO BENIGNO, JOSEPH C. CAGGIANO, ARTHUR B. CAPONEGRO, JOHN B. FOWLER, JR., J.S.LOVE, JR., ALBERT S. PISANO, HARVEY AXELROD, JAMES LEONARD BROWN, ARTHUR DALY, CHESTER GREY, FREDERICK HORWITZ, JOHN KRAPPMAN, JAMES PHILLIPS and ROBERT SMITH,

Defendants

----------x

Plaintiffs, MANUFACTURERS HANOVER TRUST COMPANY (hereinafter referred to as "Manufacturers") and IRVING TRUST COMPANY (hereinafter referred to as "Irving"), as and for their amended complaint, by their attorneys, HENDLER & MURRAY, complaining of the defendants, allege upon information and belief as follows:

AS AND FOR A FIRST CAUSE OF ACTION

1. At all times hereinafter mentioned, plaintiff Manufacturers, was and still is a banking corporation duly organized and existing under and by virtue of the laws of the State of New York and maintained and still maintains its principal offices at 350 Park Avenue, City, County and State of New York.

2. At all times hereinafter mentioned, American Home Products Corporation (hereinafter referred to as "American"), was and still is a corporation duly organized and existing under and by virtue of the laws of Delaware, duly authorized to transact business in the State of New York, with offices located at 683 Third Avenue, New York, N.Y.

3. At all times hereinafter mentioned, plaintiff Manufacturers was duly authorized to act as transfer agent for the capital stock of American.

4. At all times hereinafter mentioned, Seed Capital Corporation (hereinafter referred to as "Seed"), was a securities broker and dealer with its principal office at 61 Broadway, New York, N.Y.

5. In and about 1972, defendants, jointly and/or separately, knowingly and intentionally entered into an agreement, conspiracy and scheme to sell counterfeit certificates of American stock and to receive the proceeds to their own use and benefit.

6. In furtherance of said scheme and conspiracy, defendants, acting alone or in concert with each other and/or persons unknown, obtained ten counterfeit certificates numbered 66311 through 66320, inclusive, purporting to represent 18,000

shares of American stock, purportedly registered in the name of Gerald L. Smith.

7. In pursuance of said conspiracy and scheme, on or before October 11, 1972, defendants caused the endorsement of "Gerald L. Smith" to be forged upon stock powers attached to counterfeit certificate number 66312 for 5,000 shares of American stock, purportedly authorizing the breakup of the certificates into three certificates for 1,000 shares each and four certificates for 500 shares each.

8. In furtherance of said conspiracy and scheme, on October 11, 1972, defendants presented said counterfeit certificate number 66312 to plaintiff, Manufacturers, as transfer agent and requested that the certificates be broken up into three certificates for 1,000 shares each and four 500 share certificates, representing that the certificate and stock powers were genuine.

9. The defendants knew that said certificate number 66312 was counterfeit, not genuine, not valid and of no value, and further knew the stock power attached thereto was not genuine and valid but was a forgery, spurious and fraudulent, and intended that Manufacturers rely on the genuineness of the certificate and the stock power attached thereto in making the transfer of stock.

13. The defendants knew that said certificates numbered 66311 and 66318 through 66320, inclusive, were counterfeit, not genuine and of no value, and further knew that the stock powers attached thereto were not genuine and valid, but were forgeries, spurious and fraudulent, and intended that Manufacturers rely on the genuineness of the certificates and the stock powers attached thereto in making the transfer of stock.

14. Manufacturers, in reliance upon the genuineness of the certificates and of the purported signatures of Gerald L. Smith, cancelled the counterfeit certificates numbered 66311 and 66318 through 66320, inclusive, and issued genuine certificates numbered 71678 through 71693, inclusive (16 X 500 shares), registered in the name of Gerald L. Smith and delivered these new certificates to Seed.

15. After Manufacturers delivered each of the new certificates of stock totalling 13,000 shares of common stock of American, it was advised that each of the aforesaid certificates numbered 66311, 66312, 66318, 66319 and 66320 were not genuine and were unauthorized and that an overissuance was created by the issuance of the new certificates and the improper cancellation of said counterfeit, spurious and unauthorized certificates.

16. On or about November 19, 1972, American made demand upon Manufacturers to correct the overissuance which was caused by the defendants' fraudulent acts, as heretofore described.

17. On or about April 25, 1973, Manufacturers, as transfer agent of American, was obliged to and did purchase certificates representing 13,000 shares of American stock in the aggregate sum of $1,631,240.15 and cancelled said certificates representing 13,000 shares of American.

18. By reason of the defendants' fraud, defendants are jointly and severally liable to plaintiff, Manufacturers, in the sum of $1,631,240.15.

AS AND FOR A SECOND CAUSE OF ACTION

19. Plaintiff, Manufacturers, repeats and realleges paragraphs "1" through "18" inclusive, as if fully set forth herein.

20. In furtherance of their said scheme and conspiracy defendants acting alone or in concert with each other and/or persons unknown, caused the endorsement of Gerald L. Smith to be forged on stock powers annexed to the newly issued certificates numbered 70818 through 70824 inclusive and 71678 through 71693 inclusive, which stock powers purported to make negotiable these certificates, registered in the name of Gerald L. Smith.

21. Defendants, between October 11 and November 3, 1975, caused to be sold 13,000 shares of American Stock on the New York Stock Exchange, and delivered the aforesaid newly issued certificates in satisfaction of such sales.

22. By reason of defendant's fraud, the newly issued stock certificates and the proceeds thereof were at all times rightfully the property of Manufacturers and defendants held them in trust for Manufacturers.

23. Defendants, between October 11 and continuing to November 8, 1972, unlawfully converted to their own use and benefit the aforesaid securities, and/or the proceeds thereof, without the knowledge or consent of Manufacturers, who was then the sole owner and/or the sole entity entitled to possession of said securities.

24. By reason of the foregoing, defendants are liable jointly and severally to plaintiff, Manufacturers, in the sum of $1,631,240.15.

AS AND FOR A THIRD CAUSE OF ACTION

25. Plaintiff, Manufacturers, repeats and realleges paragraphs "1" through "17" and "20" through "23" above inclusive, as if set forth fully herein.

26. Defendants owe Manufacturers the sum of $1,631,240.15 for monies wrongfully had and received from plaintiff, Manufacturers.

27. By reason of the foregoing, defendants are jointly and severally liable to plaintiff, Manufacturers, in the sum of $1,631,240.15.

AS AND FOR A FOURTH CAUSE OF ACTION

28. At all times hereinafter mentioned, plaintiff, Irving, was and still is a banking corporation duly organized and existing under and by virtue of the laws of the State of New York, and maintained and still maintains its principal office at 1 Wall Street, City, County and State of New York.

29. Plaintiff, Irving, repeats and realleges paragraphs "2" through "14" inclusive, as if set forth fully herein.

30. In furtherance of the said scheme, defendants represented to Irving that the said spurious and counterfeit certificates numbered 66311, 66312 and 66318 through 66320 inclusive were genuine and of full value, and that the forged signatures of Gerald L. Smith, endorsed on the stock powers attached thereto, were genuine signatures of the true owner of the said genuine certificates. Defendants intended that Irving rely on the genuineness of the said certificates, and the genuineness of the signatures on the stock powers attached thereto.

31. In reliance upon the said false and fraudulent representations, Irving affixed its signature guarantee stamp upon the said stock powers.

32. As a direct consequence of its guarantee of the genuineness of the said forged signatures, Irving suffered loss in the sum of $800,000.

33. By reason of the defendants' fraud, the defendants are jointly and severally liable to Irving in the sum of $800,000.

AS AND FOR A FIFTH CAUSE OF ACTION

34. Plaintiff Irving repeats and realleges paragraphs "2" through "14" inclusive, "20" and "28" as if set forth fully herein.

35. In furtherance of the said scheme, defendants represented to Irving that the said genuine certificates numbered 70821 through 70824 inclusive and 71678 through 71693 inclusive, which were procured by fraudulent means, were the lawful property of defendants, and that the forged signatures of Gerald L. Smith on the stock powers attached thereto were genuine signatures of the true owner thereof. Defendants intended that Irving rely on the good title of defendants, and on the genuineness of the said signatures on the stock powers attached thereto.

36. In reliance upon the said false and fraudulent representations, Irving affixed its signature guarantee stamp upon the said stock powers.

37. As a direct consequence of its guarantee of the said forged signatures, Irving suffered loss in the sum of .00,000.

38. By reason of the defendants' fraud, the defendants are jointly and severally liable to plaintiff, Irving, in the sum of $800,000.

WHEREFORE, plaintiffs demand judgment:

(a) in favor of Manufacturers against all defendants jointly and severally in the sum of $1,631,240.15 on the first, second and third causes of action;

(b) in favor of Irving against all defendants jointly and severally in the sum of $800,000 on the fourth and fifth causes of action;

(c) and interest, costs and disbursements.

Dated: New York, New York
September 8, 1976

HENDLER & MURRAY
Attorneys for Plaintiffs,
15 Park Row
New York, NY 10038
(212) 964-4590

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

.s. U.S. COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

JAMES LEONARD BROWN,
Defendant-Appellant.

On Appeal from the United States District Court for the Southern District of New York.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 7th *day of* March, *19* 77 *at* One St. Andrews Plaza New York, N.Y.

deponent served the annexed [illegible] *upon* Robert Fiske Jr. U.S. Atty. Southern District

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 7th *day of* March, *19* 77

Reuben Shearer
Reuben Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977